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**A**  
**C O N C I S E V I E W**  
**OF THE**  
**COMMON and STATUTE LAW**  
**OF**  
**E N G L A N D,**

**CAREFULLY COLLECTED FROM**  
**THE STATUTES AND BEST COMMON LAW WRITERS,**  
**AND**  
**SYSTEMATICALLY DIGESTED, BY**  
**THE REV. DR. JOHN TRUSLER.**

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**L O N D O N:**

Printed for the AUTHOR; and sold by W. NICOLL, in St. Paul's Church-yard.



A  
CONCISE VIEW  
OF THE  
COMMON AND STATUTE LAW



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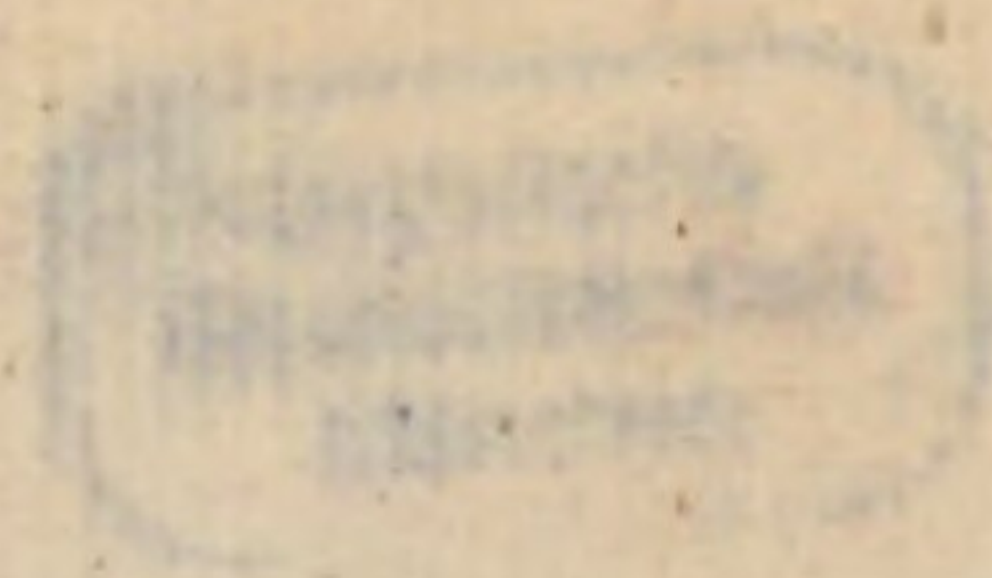
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doed : nay, should the laws of society, in any case, enjoin the perpetration of murder, we are bound in conscience rather to transgress those laws, than offend the laws of nature and religion : but with regard to things not prohibited by these superior laws : as whether corn shall be exported or imported, &c. the legislative body of the nation has power to interpose, and make the action lawful or unlawful, as the good of society may require. Hence therefore the laws of the land, here meant to be explained.

To make laws just and reasonable they ought to commence at some future time, and be made public before their commencement ; for an law, or law made to punish any particular crime, the commission of such crime is highly unreasonable ; it being idle to suppose that the offending party could foresee that action to be criminal, which, when committed, was no way prohibited. To punish a man, therefore, for such a crime, by any law made subsequent to the fact, must be cruel and unjust : but when the prohibition is made in the usual manner, it is then the business of every man to be thoroughly acquainted with it ; for if ignorance was admitted as a lawful excuse, the laws might ever

## ON THE NATURE OF OUR LAWS.

**T**HAT a knowledge of the laws of that society, in which we live, is a proper accomplishment for the gentleman and scholar, is too evident to be doubted ; it being not only a useful, but an essential part of a liberal education : every man being interested in the laws of the kingdom where he resides ; and as an unacquaintance with those laws, at least with such as immediately concern him, may subject him to very heavy penalties.

On the great law of nature and revelation rest all human laws ; that is, no human law should be suffered to clash with these : there are many points, however, wherein both natural and divine law leave a man at his liberty, but which human laws, through policy and for the benefit of society, think proper, in some measure, to restrain. Murder is a crime forbidden by the laws, both of nature and religion, and human laws have annexed a punishment to the commission of it ; but still human laws do not increase its moral guilt, nor add any fresh obligation to abstain from the horrid deed ;



deed; nay, should the laws of society, in any case, enjoin the perpetration of murder, we are bound in conscience rather to transgress those laws, than offend the laws of nature and religion: but with regard to things not prohibited by these superior laws; as, whether corn shall be exported or imported, &c. the legislative body of the kingdom has power to interpose, and make the action lawful or unlawful, as the good of society may require. Hence therefore the laws of the land, here meant to be explained.

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It may not be amiss to say a word or two respecting their interpretation; I mean, as to the *letter* or the *spirit* of the laws.

The words of a law are generally understood and taken in their most common signification. Thus, the law that forbids any one *laying hands* upon a priest, is adjudged to extend to him, who hurts a priest with a weapon: but terms of art, or technical terms, must be taken according to the common acceptation of such terms, in any art, trade, or science. In the Act of Settlement, where the throne of England is limited, “to the Princess Sophia, and the *heirs of her body* being Protestants,” it is necessary to advert to the professional terms of the law, to enquire what *heirs of her body* precisely mean, which, in a literal sense, imply only certain of her lineal issue. Where words are clearly *repugnant* in two laws, the law last made takes place of that of earlier date.

If words however still happen to be dubious, their meaning is established from what goes before, and what follows. Thus the preamble of an act of parliament is frequently called in to assist the construction



construction of it. Sometimes one law is compared with another having some affinity to it, and made about the same time, or by the same legislature: as when the Common Law condemns simoniacal contracts, we gather lights upon the subject, by considering what has been adjudged to be simony by the Canon Law.

In cases where words literally bear an absurd meaning, it is necessary to deviate even from common acceptation; as in the Bolognian law mentioned by Puffendorf, which enacted, "that who-ever *drew blood* in the streets should be severely punished;" it was, after a long debate, held not to extend to a surgeon who might occasionally open a vein there in a fainting person.

But the best mode of interpretation is to consider the reason and spirit of the law in question, or the cause which gave birth to it; which is the *equity* of law: for when the reason ceases for which any particular law is enacted, the law ought to cease with it. Can it be supposed, that, if a law was made, that those who in a storm forsake a ship, shall forfeit all their property therein to those who continue in it, it would give such property, the ship coming safe to port, to a sick man, the only one remaining in her, and who from his disorder was unable to escape? Certainly not. The reason of such a law would be to give encouragement to those that would risk their lives to save the vessel, which could not operate in behalf of such sick man.

The law of England may be divided into two kinds, *Common Law* and *Statute Law*.

*Common Law* includes not only *general customs*, but the *particular customs* of certain parts of the kingdom, and also those *particular laws*, that are customarily observed only in certain courts and jurisdictions; and is as old perhaps as the kingdom itself, being customs continued down unchanged from the primitive Britons to the present time. The *Statute Law* consists of the various acts of parliaments made from time to time.

*Common Law* may be considered as of three kinds: 1. *General Customs*; 2. *Particular Customs*; and, 3. *Certain particular Laws* of some particular Courts.

I. By the first of these, general customs, it is, that proceedings and determinations in the ordinary courts of justice are guided: it



is this branch of the Common Law that settles the course in which lands descend by inheritance; the mode and form of acquiring and alienating property; the obligation of contracts; the methods of explaining wills, deeds, and acts of parliament; the remedies for civil injuries; the several species of temporal offences, with the kind and degree of punishment, &c. &c. For example, that there shall be four superior courts of justice; the Chancery, King's Bench, Common Pleas, and Exchequer;—that the eldest son inherits from his father;—that property may be purchased and transferred by writings;—that a deed is null and void, if not sealed and delivered;—that wills shall be favourably construed; deeds more strictly;—that a breach of the peace is an offence punishable by fine and imprisonment;—that money lent upon bond is recoverable by action of debt: these are doctrines not supported by any written statute or ordinance, but which depend on Common Law, or immemorial usage.

The validity of these established doctrines is determinable by the judges of the several courts, whose knowledge in the business arises from study and experience; that is, the decisions of courts of justice are the evidence of what is Common Law. When the same point comes again in litigation, it is an established rule to abide by former precedents, the judge being sworn to determine, not according to his own private opinion, but to the known laws and customs of the land; otherwise we should have as many new laws as new opinions: indeed, where former determinations are evidently contrary to reason or divine law, exceptions are admitted; but even then, the new sentence is given, not on a presumption that the former one was *bad law*, but that it was *not law*; that is to say, that it was not agreeable to the established custom of the land.

This then is the received doctrine, that precedents *must* be followed, unless palpably absurd and unjust. It is a fixed and positive law, established by custom, time out of mind, that a brother of the half blood shall never be heir to the estate of his half brother, it shall rather fall to the King; and no judge can decree otherwise without a breach of the law and his oath. The decisions therefore of courts are records of the highest regard, and are handed down to posterity in numerous volumes called *Reports*.



II. The second branch of the Common Law are certain customs or laws which affect only particular districts. Such is the custom of Gavel-kind in Kent, which gives the inheritance of the father, not to the eldest son only, but to all the sons alike, &c. Such also are the special customs of particular manors, and the customs of the city of London with respect to trade, orphans, &c.

When a custom is inquired into, it must be proved to *exist* time immemorial, so that no one can shew the beginning of it; on which account no custom can prevail against an act of parliament; because that act has a precise beginning. It must also have been *continued peaceable*, not subject to contention and dispute, and without an *interruption* of right, though it may not have been used for a number of years. As, if the inhabitants of a village have a right to pass through certain fields to church, the right is not lost, even though it should have been discontinued for ten years; it only becomes more difficult to prove; but if the *right* be any way discontinued for a day, the custom is destroyed.

A custom also must be reasonable, or rather *not unreasonable*. Thus, a custom in a parish that no man shall turn his cattle on the common till Michaelmas day would be good, though no good reason could be shewed why a day or two earlier or later might not be adopted; but a custom that no man shall turn his cattle on till the lord of the manor has turned his on, is bad, because unreasonable; for the lord of the manor might never turn his on, and in such a case the tenants would lose their benefit.

Customs ought also to be *certain*: for example, to pay one shilling an acre in lieu of tithes is good, but to pay sometimes one shilling, and sometimes two, as the occupier of the land shall please, is bad, on account of its uncertainty. They should likewise be *compulsory*, and not left to the option of every man. That all the parishioners should be rated to the support of a bridge or a ferry, is good, but that each man shall contribute as he pleases, is bad. They must, further, be *consistent* with each other; for good customs are of equal antiquity, and settled by mutual consent; how then can they be contradictory? If one man has a right to a window looking into another's garden, the other can have no right to obstruct it; both these customs cannot be good.

III. The



III. The third branch of Common Law are those peculiar laws, used only in certain courts and jurisdictions ; such as the Civil and Canon Law.

By the *Civil Law* is generally understood the municipal law of the Roman empire, as comprized in the Institutes, the Code and Digest of the emperor Justinian, and the novel constitutions of him and some of his successors.

By the *Canon Law* is understood that body of Roman Ecclesiastical Law, relative to such matters as the church either has, or pretends to have jurisdiction over. This is compiled from the opinions of the fathers of the Latin church, the decrees of general councils, and the decretals and bulls of the see of Rome.

There are four species of Courts in which these laws are permitted to be used under certain restrictions : 1. The ecclesiastical Courts ; 2. The Military ; 3. The Courts of Admiralty ; and, 4. Those of the two universities ; the particulars of which will fall under notice hereafter : the only remarks necessary to be made on them at present is,

1. That as they are founded upon custom or Common Law, the courts of Westminster have superintendency over them, to restrain and controul them, to prohibit their excess, correct their errors, and explain such acts of parliament as concern them. And,

2. That an appeal, as the last resort, lies from these courts to the King ; a proof that their power is derived from the crown of England only.

We will next proceed to the *Statute Law*, those laws enforced by acts of parliament.

Statutes are of two sorts, *public* and *private*.

A public act regards the whole community, and of this the courts of law are bound to take notice judicially, without the party who claims an advantage under it being obliged to set it forth : but it is otherwise with private acts, which operate only on particular persons and private concerns.

Statutes are also *declaratory* or *remedial* ; declaratory of the Common Law, or remedial of some defects in that law.

1. Where old customs are fallen into disuse, or become disputable, the parliament has thought proper to interfere, and declare what



what the Common Law is : such an act or statute is called *declaratory* ; for example, the statute of treasons doth not make any new treasons, but, for the benefit of the people, points out those offences that were treason by the Common Law.

2. *Remedial* acts are such as were made to remedy the defects, and abridge the superfluities of the Common Law ; such as might arise from change of time and circumstances, and from mistakes and misinterpretations of judges, or from any other cause whatever.

The rules observed in the construction of statutes are as follow :

1. In all remedial acts, three points are considered, *viz.* the old laws, the mischief, and the remedy ; and it is the business of the judge so to construe the act, as to suppress the mischief, and to advance the remedy as much as possible. For example, by the old or Common Law, ecclesiastical corporations might grant as long leases as they pleased ; and the mischief was, that they granted leases so unreasonably long, as very much to injure their successors. To remedy this, the restraining statute of the 13 Eliz. c. 10. was enacted, which makes void all leases granted by ecclesiastic bodies for longer terms than three lives or twenty-one years. But in the construction of this act it is held that leases for a longer term, if made by a bishop, are not void during that bishop's continuance in his see ; or if granted by a dean and chapter, are not void during the continuance of the dean ; the mischief being sufficiently suppressed, by making them void upon the death or cession of the grantors.

2. A statute treating of things or persons of an *inferior* rank cannot, by any *general words*, be extended to those of a *superior*. For instance, an act containing these words ; “ Deans, prebendaries, “ parsons, vicars, *and others having spiritual promotion,*” is deemed not to extend to bishops, though they have spiritual promotion, deans being of the highest order that is named.

3. Penal statutes are ever strictly construed. For example, by the statute 14 Geo. II. c. 6. it is death to steal sheep or *other cattle* ; but the general words “ other cattle” being conceived as too loose to create a capital offence, the act was deemed to extend to sheep only ; accordingly, in the next sessions of parliament, another act was made extending the former to bulls, cows, oxen, steers, &c. by name.



4. But a more liberal and beneficial construction is put upon statutes against frauds. Indeed where the statute punishes the offender by pillory or fine, it is considered strictly; but when the statute operates only on the offence, by setting aside the fraud, it is construed literally, and in its utmost extent.

5. The different parts of an act of parliament must be so construed by each other, that the whole, if possible, may stand. As, if land be vested in the King by any act, saving the right of A; A then holding a lease of it for three years; A shall hold it for his term, and then it shall go to the King: but an exception totally repugnant to the body of the statute is void; if, therefore, an act vested the lands of A in the King, saving the right of A, the saving is void; for if the exception was good, the act would be of no effect.

6. In cases where a statute differs from the Common Law, the Common Law gives place, provided the statute expresses or implies so much; otherwise the party may waive his benefit by such statute, and take his remedy at Common Law: so an old statute gives place to a new one, provided the new one implies a negative. Suppose, for example, a former act should say, the qualification of a juror on such a trial should be one hundred marks a year, and the new one should enact that he shall have twenty marks, this new act repeals the old one; for though it does not express a negative upon the former, it necessarily implies it: but if, by a former act, an offence be indictable at the quarter sessions, and a latter one makes the same offence indictable at the assizes, the offender may be prosecuted at either, unless otherwise expressed in the body of the act.

7. Where a statute creates a new offence, no way prohibited at Common Law, and appoints a particular mode of proceeding against an offender, as by commitment, or action of debt or information, without mentioning an indictment, it will not maintain an indictment; but if such statute give a recovery by action of debt, plaint, information, *or otherwise*, it authorizes a proceeding by way of indictment. 2 *Haw.* 211.

8. If there is a prohibitory clause in the act, the offender may be indicted upon such clause notwithstanding the penalty; but otherwise, where the act is not prohibitory, but only inflicts the forfeiture,



feiture, and specifies the remedy. 2 *H. H.* 171. *Burrow, Mansfield.* 543.

9. Every contempt of a statute is indictable, where no other punishment is limited. 1 *Haw.* 60.

10. Wherever an act of parliament generally prohibits any thing, the party grieved shall not only have his action for his private relief, but the offender shall be punished at the King's suit, for the contempt of the Law. 2 *Inst.* 163.

11. Where a statute directs the doing of a thing for the sake of justice, or the public good; the word *may* is the same as the word *shall*: as where the 14 *Car. II. c. 12.* enacts, that the overseers *may* make a rate to reimburse the constable; this is construed they *shall*, they being compellable so to do. 2 *Salk.* 609.

12. In all cases where justices of the peace may take examinations, or other accusation or proof, though the statute doth not expressly set down that it shall be upon oath, yet it shall be intended so to be. *Dalt. c. 115.*

13. Where a statute appoints a conviction to be on the *oath of one witness*, this ought not to be the simple oath of the informer; lest it should induce profligate persons to commit perjury for the sake of the reward. *L. Raymond,* 1545.

14. In all cases wherein, by any act of parliament, an oath shall be allowed or required, the solemn affirmation of Quakers shall be admitted instead of such oath. But no Quaker shall, by virtue of such affirmation, be permitted to give evidence in any criminal cause, or to serve on jury, or bear any office of profit in the government. 22 *Geo. II. c. 46. s. 36, 37.*

15. Where an act of parliament says, that a person shall *forfeit* generally, such forfeiture shall go to the King, unless the forfeiture be given in lieu of property and interest, in which case it shall go to the party injured. 11 *Co.* 60. 1 *Rolls Rep.* 90. 1 *Inst.* 159.

16. *Fine and ransom* to the King in any statute, is held to imply fine only. 1 *Inst.* 127.

17. Where a magistrate is empowered by any statute, to bind a person over, or to cause him to do a certain thing, and such person being in his presence refuses, that magistrate, it is held, may commit him to gaol till he shall comply. 2 *Haw.* 116.



18. When a statute appoints imprisonment, but limits no time when, it shall be immediately; and when it limits no length of time, it must remain at the discretion of the court. 8 Co. 119. Dalt. 410.

19. When any offender shall, by a justice of the peace, be committed to the house of correction, for an offence cognizable before him, out of sessions, and the time and manner of punishment is not by law expressly limited, he may commit him to the house of correction, there to be kept to hard labour, until the next general or quarter sessions, or until discharged by due course of law. 17 Geo. II. c. 5. s. 32.

20. Wherever a statute makes an offence *felony*, it includes imprisonment, and incidentally gives it all the properties of felony at Common Law, but extends not to infants under fourteen years of age. 1 Haw. 105. 1 H. H. 706, 708.

21. Where a penalty is given to an informer upon a penal statute; he shall have no costs, unless the statute itself directs it; but he shall pay his costs out of the penalty: magistrates, therefore, having power to inflict penalties not exceeding such a sum, should consider the costs of prosecutors. 2 Haw. 274. Burn.

22. Where a statute gives *treble damages*, magistrates are not to assess the damages, and then treble them; but such damages should be found by a jury, and then the justices are to treble them. Cro. Car. 449.

23. Where acts inflict a penalty for a *second* offence, it is always understood to imply, after conviction and judgment for the first offence. 2 Inst. 468.

24. If one statute repealing another, is itself repealed afterwards, the first statute is hereby revived.

25. Statutes derogating from the power of subsequent parliaments are of no validity; the legislature, being always of equal and of sovereign power, cannot be clogged or bound by any acts of a former parliament.

26. *Lastly*, Should an act be passed impossible to be performed, such an act of course cannot bind; or should there arise, from any part of a statute, any absurd consequences, manifestly contradicting common reason, such parts would be void; judges being left to determine



determine accordingly: they, in this case, suppose the matter to have escaped the attention of parliament, and therefore expound the statute by equity. For example, should an act give a man power to try all causes arising within his own manor, it would not follow that he should have liberty to try a cause in which he himself was concerned; it being unreasonable that any man should determine his own dispute: but could it be conceived that parliament should enact that he should try his own cause equally with those of others, no court could defeat it: there being no doubt but that the legislature designed it.

This is the ground-work of the laws of England; equity is, however, called in often to assist, to moderate and explain them. It is the province of the courts of equity to detect concealed frauds, which other courts cannot so well reach, to enforce the execution of such matters, as are not cognizable in other courts, but binding only on the conscience, and to relieve from such dangers and oppressions as are owing to misfortune and oversight; but they have jurisdiction only in matters of property; for the freedom of our constitution will not permit a judge, in criminal cases, to construe the law, otherwise than according to the *letter*; whereas judges in equity adhere to the *spirit* of it. In criminal cases, no partiality can strain the law to punish more than the letter will warrant, and in cases where the letter bears hard, the judges recommend, and the crown has a power to pardon.

Having shewn the nature of our laws, it may be necessary to say something of those countries subject to them.

The Common Law, when speaking of the kingdom of England, neither includes Wales, Scotland, Ireland, or any other part of the dominions of the crown, but barely England; and yet the civil laws and local customs of England extend to these and many other adjacent countries.

Wales continued independent till conquered by Edward I. but the finishing stroke to their independency was given in 1535, by admitting them to a thorough communication of laws with the subjects of England.

Scotland, notwithstanding the union of the crowns by the accession of James the Sixth to that of England, continued a distinct



kingdom till the year 1707, when an union of the two kingdoms took place under the name of Great Britain, and when it was settled that the standards of coin, weights, and measures, and the laws relating to trade, customs, and the excise, shall be the same in both kingdoms; but all the other laws of Scotland shall remain in force, but alterable by the parliament of Great Britain; except that such as relate to private right shall not be altered, but for the evident utility of the people of Scotland; that sixteen peers should be chosen by the peerage of Scotland to represent them in parliament, and forty-five members by the people to sit in the House of Commons; that the sixteen peers shall have all the privileges of parliament; and all peers of Scotland shall be peers of Great Britain, and rank next after those of the same degree at the time of the union, and have all the privileges of peers, except sitting in the House of Lords, and voting in the trial of a peer. In the act that ratifies the union, it is expressly declared, that the church of Scotland, and also their four universities, shall be established for ever, and all succeeding sovereigns shall swear to maintain the same inviolably; so that from this act of union nothing can ever separate the two kingdoms again, but the mutual consent of both, or the successful resistance of either.

The laws of Scotland being ordained to be observed in that part of the island, unless altered by parliament, and parliament having made little or no alterations in them, the municipal or common laws of England there have no force.

Berwick upon Tweed was originally part of Scotland, but conquered and united to England by Edward I. Though it has some local peculiarities derived from the laws of Scotland, it is clearly part of the realm of England, and bound by all acts of the British parliament, whether specially named in those acts or not.

Ireland is still a distinct kingdom, though dependent on and subordinate to this, but is bound by no English act of parliament, unless specially named or included under general words, such as "within any of the King's dominions;" the people seem disposed however at present to refuse submission to an English act of parliament, and how this will end is yet unknown. The old method of passing statutes in Ireland was nearly the same as in England, the Viceroy calling  
parliaments,



parliaments, which enacted such laws as they thought proper; but this liberty being abused, a set of statutes were enacted in the reign of Henry VII. when Sir Edward Poynings was viceroy; one of which provides, that before any parliament be summoned, the chief governor shall certify to the King, under the great seal of Ireland, the nature of the acts proposed to be there passed, who shall have power in council to consider the matter, and in case he approves the measure, and certifies it back under the great seal of England, a parliament may be summoned to pass it into a law if they please; but with such alterations only as the King might think proper to make. By this means there was nothing left to the parliament of Ireland, but a power of rejecting any law they disliked. The custom is, however, now to lay before the Lord Lieutenant and his privy council, the heads of any bill framed in either house of parliament, for their consideration, who approve or reject it, without sending it to England.

Indeed the laws of Ireland communicate so extensively with our laws, that appeals from the court of King's Bench in Ireland are made to the court of King's Bench here, and appeals from Chancery there are made to the House of Lords here; for though they have power to administer justice in their own courts, it is but reasonable that the appeal in the last resort should be to the courts of the superior state.

The isles of Wight, Portland, Thanet, &c. are considered as part of some neighbouring county, and, of course, as part of England; but there are other isles that require more notice.

The Isle of Man is distinct from England, and not governed by our laws; neither does any act of parliament bind it, unless it be particularly named therein. It was formerly subject to Norway, and afterwards to Scotland, then to England; but was in the Derby family from the reign of Henry IV. till 1765, when it was purchased by the crown of the Duke of Athol, reserving to the Duke his own landed property, his manerial rights and emoluments, and the patronage of the bishopric and other ecclesiastical benefices. Though no writ of process from the courts of Westminster was of any authority in Man, an appeal lay from the lord of the island to the King of Great Britain in council. The island

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is subject, however, now to regulations of the British excise and customs.

Jersey, Guernsey, Sark, Alderney, and their appendages were part of the duchy of Normandy and united to the crown of England by the first princes of the Norman line: they are governed, however, by laws of their own; but the King's commission has force there; though they are bound by no acts of parliaments, unless particularly named. All causes there are determined by their own officers; but an appeal lies from them to the King in council.

Our more distant plantations in America, or elsewhere, are, or were, till the present troubles, in some respect subject to the laws of England. The Common Law can have no jurisdiction there, they being distinct countries. They are subject, however, to the controul of our parliament, though, like Ireland and Man, not bound by any act unless particularly named.

We come now to consider the kingdom of England in particular, the subject of those laws that will be treated of in this work. And this includes not only Wales and Berwick, but part of the sea as far as low-water mark. Over the space between high-water mark and that of low water, the Court of Admiralty and Common Law have alternate jurisdiction; the former on the water, when the tide is up, the latter on the land when the tide is down. The main sea is part of the realm of England, subject to the jurisdiction of the Court of Admiralty.

England may be considered as two divisions; one ecclesiastical, the other, civil.

1. The ecclesiastical division consists of two provinces, Canterbury and York; a province being the extent of an archbishop's jurisdiction. The province of Canterbury includes twenty-one sees, or dioceses of suffragan bishops; that of York the other three, *viz.* Carlisle, Chester, and Durham, besides the bishopric of Man. Each diocese is divided into archdeaconries, of which there are in all sixty, which are the circuit of the archdeacon's and rural dean's jurisdiction, and of which we shall speak hereafter; and every deanery is divided into parishes. Rural deans were antiently officers of the church, now in disuse; a kind of deputies planted by the bishops round their dioceses.



dioceses to inspect the clergy, report dilapidations, examine candidates for confirmation, and do other minuter matters.

A parish is that extent of ground committed to the charge of a rector or vicar, of which there are in number about ten thousand. The boundaries of these were originally marked, agreeable to the manor or manors they stood in. As Christianity spread, the lords of these manors began to build churches on their wastes for the accommodation of their tenants, and obliged those tenants to appropriate their tithes to the support of one officiating minister, which before were distributed among the clergy of the diocese, and this tract or extent of land, the tithes of which were so appropriated, became a parish. And if a lord had a parcel of land lying at a distance from the body of his estate, not sufficient to form a parish of itself, he endowed his church with the tithes of those detached lands, which accounts for the frequent intermixture of parishes one with another. But some lands, either because they were in the possession of careless or irreligious owners, or were situate in desert places, were never united to any parish, and continue, to the present time, extraparochial.

2. The civil division of the kingdom is into counties; of counties, into hundreds; of hundreds, into tithings or towns, so called because *ten* freeholders with their families composed a tithing; and ten tithings was called a hundred, because it consisted of ten times ten families. One of the principal inhabitants being annually appointed to preside over the rest, was called a tithing-man.

A city is a town incorporated, which is or hath been the see of a bishop, as Westminster. A borough is a town that sends members to parliament, whether it be a corporation or not. There are other towns, neither cities nor boroughs, to the number of eight thousand eight hundred and three, but this number includes the villages: appendages to such towns are called Hamlets.

Each hundred is governed by a high constable or bailiff. In northern counties hundreds are called Wapentakes. An indefinite number of hundreds form a county or shire; though in some counties there is an intermediate division between shires and hundreds; as lathes in Kent and rapes in Suffex, each containing three or four hundreds. In England there are forty counties; in Wales, twelve.

Three



Three of these counties are called Counties Palatine, *viz.* Chester, Durham, and Lancaster, from a *palatio*, because the owners, the Earl of Chester, Bishop of Durham, and Duke of Lancaster had royal rights there, as fully as the King has in his palace; such as, a power to pardon treasons, murders, and felonies; appoint judges and justices; and all writs ran in their names. Of these three, Durham is the only one remaining in the hands of a subject; the earldom of Chester being united to the crown, and the duchy of Lancaster vested in the same, but under a separate government from other royal inheritances.

The Isle of Ely is a royal franchise, the bishop having, by grant of Hen. I. royal rights within the island, whereby he has jurisdiction over all causes, criminal and civil.

There are also certain cities and towns that are counties of themselves, with more or less territory annexed, not comprized in any other county, but are governed, by favour of different Kings, by their own sheriffs and magistrates; as, for example, London, York, Bristol, Norwich, Coventry, and others.

**A VIEW**

Three



# A VIEW OF THE LAW.

## B O O K I.

### OF THE RIGHTS OF THE PEOPLE.

#### C H A P. I.

#### OF THE RIGHTS OF PERSONS.

**T**HE municipal or civil law of this country being a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong, it follows, that the principal objects of the law are *rights* and *wrongs*. We will therefore consider these in their turn.

*Rights* may be divided into those of *persons* and those of *things*. We will begin then with the rights of persons, and consider the means of acquiring and losing them.

Persons are divided by the law into natural and artificial. Natural persons are such as nature formed them; artificial, such as become so by union, *viz.* corporations, or bodies politic.

The rights of persons in their natural situation are also of two kinds; absolute and relative; absolute, are such as belong to particular men, merely as individuals; relative, such as appertain to them, as members of society. Absolute rights then will come first under consideration.

The absolute rights of men may be reduced to three: 1. The right of personal security; 2. That of personal liberty; and, 3. That of private property.



I. Man's right of personal security consists in the legal and uninterrupted enjoyment of his life, his body, and his character.

1. Life is the gift of God, a right inherent in every man by nature, and is protected by law even in the womb. For if a woman quick with child destroy the infant within her, or if any one beat her, so as to cause her to be delivered of a dead child, it is considered as a heinous misdemeanour. An infant even unborn is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned, and an estate may be limited to its use, which it may afterwards take possession of.

2. Man has an inherent right also to his body. Both the life and limbs are of such high value, that a man may kill another in defence of them: and the execution of any deed, if done through fear of death or maim, is null and void. A man's body also is entitled, by the same natural right, to a security from any corporal sufferance, though such sufferance does not reach to the destruction of life or limb.

3. Character is a right to which every man is naturally entitled, since without a good name, he can have no perfect enjoyment of any other right: but of this more hereafter.

II. Next to personal security is the right of personal liberty, which the laws of this country have protected. It never can be abridged at the discretion of the magistrate, without the permission of the laws. The great charter called *Magna Charta*, expressly says; "No freeman shall be taken or imprisoned but by the lawful judgment of his equals, or by the law of the land." And many later statutes direct, that no man shall be imprisoned by suggestion or petition to the King or council, unless it be by legal process; and of so great importance to the public is the security of personal liberty, that by 31 Charles II. c. 2. the *Habeas corpus* act was passed, for the preservation of this right, and in the 1st of William and Mary, stat. 2. c. 2. lest this act should be evaded by demanding unreasonable bail or surety for the prisoner's appearance, it was enacted that "excessive bail should not be required."

Confinement of any kind is considered as imprisonment; such as, keeping a man against his will in a private house, or arresting or forcibly detaining him in the street. Nay, so much does the law dis-



discountenance illegal imprisonment, that if a man is compelled through fear of being longer confined, to seal a bond or execute a deed, such bond or deed will be void, provided the confinement was illegal : and to make confinement legal, it must either be by process from some of the courts of judicature, or by warrant in writing expressing the causes of the commitment, under the hand and seal of some magistrate or legal officer having authority to commit.

A natural consequence of this personal liberty is, that no Englishman may be driven from his country, unless by sentence of the law. The King may, by his prerogative, prevent his subjects going abroad without licence ; the safety of the state may require it ; but no power, except the authority of parliament, can send any English subject *out* of the land against his will ; not even a criminal : nor is there any law that will justify the sending a subject and inhabitant of England, Wales, or Berwick prisoner into Scotland, Ireland, or any place out of the kingdom, where they cannot have the benefit and protection of the Common Law. Whoever attempts it is liable to severe and heavy penalties. Nay, though *within* the realm, the King may command the service of all his liegemen, yet he can send none *out*, but soldiers or sailors, whose employ naturally implies an exception.

III. The third absolute right of an Englishman is his property, to the free use, enjoyment, and disposal of which he is intitled, without any diminution or controul ; except only by the laws of that society in which he voluntarily lives. The law is extremely careful in guarding and protecting this right, and a variety of ancient statutes there are to defend it from encroachment. It will not authorize the violation of private property, even for the general good. The legislature does occasionally oblige owners of land to sell it for the benefit of making public roads, but these exertions of power are ever used with caution, and the person so obliged to alienate, is paid the full value for his land.

Nor can any subject of England be compelled to pay a tax, even for the defence of the state, but such as is imposed by his own consent, or that of his representatives in parliament.



To protect these great and absolute rights the constitution of this country has established certain other subordinate ones as barriers. These are,

1. The powers of parliament; 2. The limitation of the King's prerogative; 3. The right of applying to the courts of justice for redress; 4. The right of petitioning the King or parliament; and, 5. That of having arms for our defence.

The first will be the subject of the next chapter; and the second will be treated of hereafter.

With respect to the third, that of applying for redress to the courts of justice, I shall only at present say, that as every one, according to Sir Edward Coke, is to "have justice and right for the injury done to him, freely, without sale; fully, without any denial; and speedily, without delay;" many are the acts of parliament wherein justice is directed to be done according to the law of the land; and what that law is every one may know if he pleases; for, as I observed before, it does not rest on the will of any judge, but is fixed and unchangeable, except altered by parliament: nor can the authority of the crown at any time suspend or dispense with it; and that all things may be fair and explicit, courts of justice must at all times be open.

On the right of petitioning the King in parliament, the only restriction is, to prevent riot or tumult, that of the 13 Car. II. stat. 1. c. 5. that no petition for any alteration in church and state, shall be signed by more than twenty persons, unless the matter be approved by three justices, or the major part of the grand jury in the county; and in London, by the mayor, aldermen, and common council; nor shall any petition be presented by more than ten persons at one time.

The last auxiliary right, that of having arms for our defence, according to our condition and degree, is allowed by 1 W. & Mar. ft. 2. c. 2. under certain restrictions, as a natural right of self-preservation, when the sanction of the laws is found insufficient to restrain the violence of oppression.



## C H A P. II.

## OF THE PARLIAMENT.

HAVING treated of the *absolute* rights of persons as individuals, we are next to consider their *relative* rights, as members of society; or as they stand in various relations to each other; and these are either public or private.

The principal public relation between men is that which binds them to good order; as that of magistrates and people.

In all despotic governments, the supreme magistracy, or the power of *making* and *enforcing* laws, is vested in one man, or one body of men, and where these two are united, there can be no public liberty; but where the legislative and executive authority are in different, distinct hands, as in England, the former will take care not to entrust the latter with such powers as may tend to destroy its own independency.

Political writers of antiquity will allow but three regular forms of government, democracy, aristocracy, and monarchy; when the sovereign power is lodged in an assembly of all the free members of a community, it is called a *democracy*; when in a council composed of select members, an *aristocracy*; and when entrusted in the hands of a single person, it is stiled a *monarchy*.

In a democratic or republican government, where the right of making laws rests in the people at large, public virtue or uprightness of intention is most likely to be found; but though public spirit and a degree of patriotism is generally inherent in the assemblies of the people, such assemblies are often absurd in their contrivance, and weak in their execution. In aristocratic governments, they being composed (or intended so to be) of the most experienced citizens, more wisdom indeed is to be expected, but less honesty than in a democracy, and less strength than in a monarchy. A monarchy, of course, is the most powerful of any, being a conjunction of the legislative and executive powers, placed in the hands of the prince; but in monarchies there is danger of the prince's employing those powers to impolitic or oppressive purposes. Thus  
have



have these three species of government their several perfections and imperfections. A democracy is generally best calculated to direct the end of a law; an aristocracy, to find out means to obtain that end; and monarchy, to carry those means into execution.

But the British constitution, being a mixture of the whole, has the perfections of all, without the imperfection of either; for the executive power being lodged in a single person, the laws have all the advantages of strength and dispatch to be found in the most absolute monarchy; and the legislature being entrusted to three distinct powers, totally independent of each other, *viz.* King, Lords, and Commons; the Lords being an aristocratical assembly of persons selected for their piety, their wisdom, their valour, and their property; and the Commons being a kind of democracy chosen by the people from among themselves, a body actuated by different springs and attentive to different interests, no inconvenience is to be dreaded from either, each power having a negative voice sufficient to repel any inexpedient or dangerous innovation.

The executive power then, in our constitution, is the King alone, who of course is supreme magistrate; but the legislative authority consists of King, Lords, and Commons, and is the parliament of Great Britain, of which we are now to treat. And herein I shall consider, 1. Its manner of assembling; 2. Its constituent parts; 3. Its laws and customs; 4. Its modes of proceeding; and, 5. Its methods of discontinuance. And,

I. As to its manner of assembling. It being part of the royal prerogative, that no parliament can be called together otherwise than by the King's authority alone; the King's writ for this purpose is issued out of Chancery, by advice of the privy council, forty days before it begins to sit. The only exception to this rule is, that on the demise of the crown, if there be no parliament in being, the last parliament revives, and sits again for six months, unless dissolved by the successor. A case or two of necessity, as at the Restoration and Revolution, have indeed interrupted for a while this established rule, but these examples cannot be alledged in prejudice of the constitution. But as the King only can convene a parliament, the statute 6 Wil. & M. c. 2. enacts, that a new parliament be called within three years after the dissolution of the former.

II. Next,



II. Next, for its constituent parts. These are the King, Lords, and Commons. The chief excellence of our constitution is, that of these three branches of the legislative power, each is a check upon the other. As an act must have the concurrence of these three branches before it passes into a law, the Commons are a check upon the Lords, and the Lords upon the Commons, by the privilege each has of rejecting what the other has resolved; while the King is a check upon both, preserving thus the executive power from encroachment. Nay, the two houses of parliament have also a privilege of impeaching and punishing the conduct of the King's evil agents or counsellors, checking thus the executive power itself.

Let us consider these several branches separately. The first is the King; but of this branch we shall treat hereafter: the next in order is the House of Peers, which consists of Lords spiritual and temporal.

The spiritual Lords are the two archbishops and twenty-four bishops, the temporal Lords are all peers of the realm (bishops being only peers of parliament) *viz.* dukes, marquesses, earls, viscounts, and barons, whose number may be increased at the will of the crown. Sixteen of these peers sit as the representatives of the peerage of Scotland, the rest hold their seats by descent or creation.

The Commons of England consist of all such men of property throughout the kingdom as have not seats in the House of Lords, every one of whom has a vote in parliament; but as the people of England are too numerous to assemble to do business, in any one place, certain districts choose their representatives, who meet in parliament, and vote for them. The counties are therefore represented by knights, elected by the freeholders, or men of landed property; the cities and boroughs, by citizens and burgesses, chosen by the mercantile part of the people. The House of Commons consists of five hundred and fifty-eight members, forty-five of whom are chosen in Scotland and represent the people of that kingdom, the rest represent the people of England: and each member, when in parliament, though chosen by one district, serves for the whole realm; his attendance there not being to benefit his particular constituents alone, but the whole body of the people in general, of course he is not bound to obey their particular instructions.

III. We



III. We now proceed to the laws and customs of parliament, considered as an aggregate body.

Its power is so great and extensive as to have been called omnipotent; for it can do every thing, not in its own nature impossible. It can regulate or new-model the succession to the throne; it can alter the established religion of the land; it can change as it pleases the constitution of the country; and what the parliament doth, no authority can undo; highly necessary, therefore, is it, that proper delegates be appointed; and to prevent those mischiefs that might arise by placing this power in improper hands, it is settled that no peer, foreigner, or minor shall sit in the House; and by 30 Car. II. st. 2 and 1 Geo. I. c. 13. that every member shall take the oaths of allegiance, supremacy, and abjuration, and shall subscribe the declaration against popery. No alien, though naturalized, by 12 & 13 W. III. c. 2. shall be capable of sitting in either House of Parliament; and each House has a power of expelling any of their respective members, on complaint and proof of their being guilty of any crime.

As every court of justice hath laws and customs for its direction, so hath the high court of parliament; each House having a sole power of examining, discussing, and adjudging its own matters. The Lords will not suffer the Commons to interfere in settling the election of a peer of Scotland; the Commons will not allow the Lords to judge of the election of a knight or a burgess; nor will either House permit the subordinate courts of law to examine the merits of either case. The maxims, however, on which they proceed, are not ascertained by any stated laws, but rest entirely in the breast of the parliament itself.

The privileges of parliament are also very large and indefinite; parliament having a power to adopt what privileges they please. Some of the principal, however, at present settled, are those of speech, of person, of their domestics, and of their lands and goods. Privilege of speech is declared by 1 W. & M. st. 2. c. 2. to be one of the liberties of the people; and ought not to be impeached or questioned in any court or place out of parliament. This freedom of speech is particularly demanded of the King in person by the Speaker of the House of Commons, at the opening of every new parliament.

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To assault a member of either House, or any of his servants, is a high contempt of parliament, and punished there with great severity.

But all other privileges which derogate from the Common Law are now no more, excepting only the members freedom from arrests in civil cases, which in a peer holds for life; in a member of the House of Commons, for forty days only after prorogation, and forty days before the next appointing meeting; which is in effect as long as the parliament subsists, it being seldom prorogued for more than eighty days at a time. In criminal cases the Lords or Commons are to be made acquainted with the supposed crime of their respective member, and their consent first had for his detainer; but since the Revolution, the information has been ever given subsequent to the arrest.

So much for the customs of parliament, considered as an aggregate body: let us now proceed to those of the Upper House in particular. By the forest charter, confirmed by the 9 Hen. III. every spiritual or temporal lord summoned to parliament, and passing through the King's forests, may, in going or returning, kill a deer or two without warrant.

The House of Peers has a right to be attended, and are, by the judges of the Courts of King's Bench and Common Pleas, and such of the Barons of the Exchequer as have been made serjeants; as also by the King's serjeants and masters of the Court of Chancery; for their advice in law matters. The secretaries of state, with the attorney general, formerly attended also, and have even now at the opening of every parliament their writs of summons regularly issued, together with those of the judges, &c. But of late years, whenever they have been members of the House of Commons, their attendance has been excused.

Every peer, by licence from the King, can appoint in his absence another Lord of Parliament to vote for him. Members of the other House cannot do this, they being only proxies themselves. Each peer also has a right, by leave of the House, to enter on the journals his dissent or protest against any determination passing contrary to his sentiments.

Bills also that may any way affect the rights of the peerage, are to originate in the House of Peers, and to undergo no change or alteration in the House of Commons.



The customs and laws of the House of Commons relate chiefly to the levying of taxes and the election of their members.

It being an ancient liberty of the people not to have their property taken from them without their own consent, all grants of taxes for the exigencies of government originate in the House of Commons; for as the Lords are an hereditary body, created at the pleasure of the crown, they are supposed to be more under the influence of the King than the Commons, who are temporary only and elected by the people; of course it would be dangerous to give them a power of taxing the people in general; but as they pay a proportion of the taxes, if they think the Commons are too lavish in their grants, they can reject them; and so jealous is the Commons of this privilege, that they will not suffer the least alteration to be made by the Lords in any money-bill they send them, though such money-bill should relate only to collections for turnpikes, parish rates, or the like.

Next with regard to the choice of their members; which may be reduced to three points; 1. The qualifications of the electors; 2. Those of the elected; and, 3. The proceedings at elections.

I. The qualification of a voter for a knight of the shire, who is a representative of the landed interest of the nation, is a freehold estate of forty shillings value *per* year. By the possession of such a property, which, at the time this law was established, would have furnished all the necessaries of life, and rendered the freeholder, if he pleased, independent, it was supposed he would be above parting with his vote, but with a view to his landed interest only. The other subordinate qualifications are as follow: 1. No person is capable of voting under twenty-one years of age. 2. None convicted of perjury or subornation of perjury. These last two extend equally to members for boroughs as counties. 3. Every voter shall have been in possession of his freehold a year before, and have paid land-tax for the same, except it comes to him by descent, marriage, marriage-settlement, will, or promotion to a benefice or office. 4. In mortgaged or trust estates, the person in possession under the like restrictions, shall have the vote. And, 5. To prevent splitting of votes, only one person shall vote for any one house or tenement.

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The electors for members of borough towns are supposed to be the mercantile part of the kingdom; and as trade fluctuates often from town to town, it was formerly left to the king to summon such towns as flourished most to send representatives; so that the citizens or burgeses in parliament increased as trade increased, or towns became populous; but the mischief is, the deserted towns continue to be summoned equally with those to whom their trade and inhabitants were removed; except some few, who petitioned to be eased of the expence of sending members to parliament; the pay of a knight of the shire being four shillings a day, that of a burges two shillings. Hence the number of members of the House of Commons is increased, since the reign of Hen. VI. from three hundred to upwards of five hundred. By statute 3 Geo. III. c. 15. No freeman of any city or borough shall be allowed to vote, unless he has been a freeman a year before, except he claim such freedom by birth, marriage, or servitude.

II. Next as to the qualifications of the members elected. Some of these rest on the custom of parliaments, and some on statutes. From these we gather, that, 1. They must not be minors, or foreigners born. 2. They must not be any of the twelve judges, these sitting in the House of Lords; nor of the clergy, these sitting in convocation; nor persons attainted of treason or felony. 3. They must not be sheriffs of the counties they are chosen for, nor mayors or bailiffs of boroughs, these being the returning officers; 4. Nor must they be concerned in the management of any duties or taxes created since 1692, except the commissioners of the treasury; nor any of the following officers, *viz.* commissioners of prizes, transports, sick, and wounded; wine licences, navy and victualling; secretaries or receivers of prizes; comptrollers of the army accounts; agents for regiments; governors of plantations or their deputies; officers of Minorca or Gibraltar; officers of the excise and customs; clerks or deputies in the several offices of the treasury, exchequer, navy, victualling, admiralty, pay of the army or navy, secretaries of state, salt, stamps, appeals, wine licences, hackney-coaches, hawkers and pedlars; nor any persons that hold any new office under the crown created since 1705. 5. No person having a pension under the crown during pleasure, or for any term of years, is



capable of, being elected or, sitting. 6. Any member accepting an office under the crown, except an officer in the army or navy accepting a new commission, vacates his seat; but he may be re-chosen. 7. Representatives of counties shall have a clear estate, freehold or copyhold, to the value of six hundred pounds a year, and shall be gentlemen, by no means of the degree of yeoman; and representatives of boroughs to the value of three hundred pounds; except the eldest sons of peers, and of persons qualified for knights of the shire, and except the members for the two universities; and of this qualification the member must make oath and give in the particulars in writing when he takes his seat.

III. The third point, respecting elections, is the mode of proceeding therein.

The Lord Chancellor, as soon as the parliament is summoned, or the Speaker, by order of the House, if a vacancy happens while the parliament is sitting, or even without an order, if during a recess, for more than twenty days, sends his warrant to the clerk of the crown in chancery, who issues out writs to the sheriff of every county, for the election of all the members to serve for that county and its boroughs. Within three days after the receipt of such writ, the sheriff sends his precept to the several returning officers of the boroughs, commanding them to elect their members; those officers are to proceed to election within eight days from the receipt of the precept, giving five days notice of the same, and return the persons chosen, with the precept, to the sheriff.

But in county elections, it is the business of the sheriff himself, and he is to proceed at the next county court happening after the delivery of the writ. Should the county court happen on the day of the writ's being delivered, or within six days after, he may adjourn the court and election to some other day as most convenient, provided it be not more than sixteen days or less than ten; but he cannot change the place without the approbation of the candidates; and in all such cases ten days public notice must be given of the time and place of election.

And as freedom of election is essential to the very being of parliaments, all undue influence upon the electors is illegal; nay that there may not be a shadow of influence in the crown, soldiers quartered



tered in any place where the election is to be held, are to remove at least one day before the election to two miles distance, and not return till one day after. Riots have frequently made elections void ; and, by an order of the House of Commons, where contested elections are alone decided, no peer of parliament or lord lieutenant of a county are suffered to interfere in any election ; and, by statute, the lord warden of the Cinque Ports shall not recommend any members there ; and if any officer of the excise, customs, stamps, or certain other branches of the revenue shall presume to interfere, by persuading or dissuading any voter, he shall be fined one hundred pounds, and be disabled to hold any office in future.

Thus is the freedom of election secured from any improper influence of the crown or of the House of Lords, and to avoid the danger of bribery in the candidates themselves, it is enacted, That no candidate, after the date of the writs, or after the vacancy, shall give or promise to give any money, or entertainment to the electors or their friends, or to the place in general, in order to his being chosen, on pain of incapacity to serve for that place in parliament ; and if any reward whatever be given or promised to any voter by way of influence to cause him to give or withhold his voice ; both he that takes and he that offers such reward shall forfeit five hundred pounds, and be incapable of voting or holding any office in any corporation, unless before conviction he discover some similar offender ; in which case he is indemnified for his own offence.

Undue influence being thus guarded against, the election is to proceed on the day appointed ; the sheriff or returning officer first taking an oath that he is not bribed, and that he will execute his office conscientiously ; if required also, the candidates must swear to their qualifications, and the voters to theirs ; the electors also may be obliged to take the oath of abjuration, and that against bribery and corruption.

The poll or election being over, the returning officer in boroughs returns his precept to the sheriff, with the persons elected by a majority of votes, and the sheriff returns the whole, with the writ for the county, and the knights chosen thereon, to the clerk of the crown in Chancery, and this before the day the new parliament meets,



meets, or if on an occasional vacancy, within fourteen days after the election, under the forfeiture of five hundred pounds; and such returned members are the fitting members, till the House of Commons, on petition and proof, shall adjudge the return to be false and illegal. Any person bribing a returning officer forfeits three hundred pounds. The proceedings upon such petition are now regulated by act of parliament, which directs a select committee of fifteen members of the House, to be chosen by lot, who are sworn to examine well into the same, and give judgment accordingly.

IV. The modes of proceeding in parliament, or the method of their doing business is much the same in both Houses. Each House of parliament has its speaker. The Lord Chancellor or Lord Keeper is generally the Speaker of the Upper House, who regulates the formalities of business. The King by commission may appoint any other, and if none be so appointed, the House of Lords may elect. The Speaker of the Lower House is chosen by the members, but must be approved by the King. The Speaker of the House of Commons cannot give his opinion in any subject in the House; but the Speaker of the House of Lords, if a lord of parliament, may. In both Houses, a majority of voices binds the whole, and this majority is given publicly and openly, so that a senator's conduct is open to the censure of the public.

When a bill or act of parliament of a private nature is wished for, a petition is first presented by some member, setting forth the nature of the case; if this petition be founded on facts that may be or are disputed, it is referred to a committee of members to examine the matter and report accordingly, and then (or on the petition itself, if not opposed) leave is given to bring in a bill. If the matter be of a public nature, the bill is admitted on a motion made to the House by any member, and seconded, even without a petition.

The persons appointed to bring in the bill, present it at a proper time to the House, drawn out on paper, with blank or void spaces, where it requires settling by parliament; such as dates, penalties, &c. If a bill of a private nature originates in the House of Lords, it is referred to two judges, who examine and report the facts alledged, see that all parties are consenting, and settle all points



points of technical propriety. This done, it is read a first time, and some little time after, a second; after each reading, the Speaker opening to the House the substance of the bill and putting the question whether or not it shall proceed any further. As the bill may be opposed at its introduction, so may it at either of the readings; and if the opposition be supported by a majority, the bill must be dropped for that session, as it must also, if opposed with success in any of the subsequent stages.

After the second reading, it is committed or referred to a committee, which in matters of small importance is selected by the House; or else the House resolves itself into a committee of the whole body, which is composed of every member; in which case the Speaker quits the chair (another chairman being appointed) and may sit and debate as a private member. In such committee the bill is discussed, clause by clause; amendments, if any made, and the blank spaces filled up. When it has gone through this examination and discussion the chairman reports it to the House with such alterations as the committee have made; it is then reconsidered, and the opinion of the House taken upon every clause and amendment. This done, it is ordered to be engrossed, or written on parchment; after this, it is read a third time, and amendments are sometimes then made; and if a new clause be added, it is done by tacking a separate piece of parchment on the bill, which is called a *Ryder*. The Speaker then opens the contents again, and, holding it up in his hands, takes the sense of the House, whether the bill shall pass? If agreed to, its title is settled, and one of the members is directed to carry it to the Lords, and desire their concurrence; who, attended by several more, carries it to the bar of the House of Lords and there delivers it to their Speaker, who comes down from the wool-sack to receive it.

In the House of Lords it passes through the same forms as in the House of Commons, and if rejected, no notice is taken, to prevent improper altercations. If agreed to, the Lords send a message by two Masters in Chancery, or sometimes two Judges, that they have agreed to the same; and if they have made no amendments to it, the bill remains with them; but if any amendments are made, such amendments are sent down with the bill to receive the concurrence



rence of the Commons. Should the Commons disagree to the amendments, a conference is held between members deputed by each House, who generally adjust the difference; but if both parties remain inflexible, the bill is dropped. If the Commons agree to the amendments, the bill is returned to the Lords by one of the members, with a message acquainting them with it. Similar forms are observed when the bill originates in the House of Lords, except when an act of grace or pardon is passed; it is then first signed by the King, and read once only in each House, without any new expression or amendment. When a bill has passed both Houses, it is deposited in the Upper to wait the royal assent, except it be a money bill, which, after receiving the concurrence of the Lords, is sent back to the House of Commons.

There are two ways of giving the royal assent.

1. In person. In this case the King goes to the House of Lords, there puts on his crown and royal robes, and sending for the Commons to the bar, the titles of all the bills that have passed both Houses are read, and the King's answer is declared by the clerk of the parliament in Norman-French. If the King concurs to a public bill, the clerk says, "*Le Roy le veut*;" that is, "The King wills it so;" if to a private bill, "*Soit fait come il est désiré*," "Be it as it is desired." If the King refuses his assent, it is thus expressed; "*Le Roy s'avisera*," "The King will take advice upon it." When a bill of supply is passed, it is carried up to the House of Lords by the Speaker of the House of Commons, and presented by him to the King, whose assent by the clerk is thus expressed; "*Le Roy remercie ses loyal subjects, accepte leur benevolence, & aussi le veut*;" "The King thanks his loyal subjects, accepts their benevolence, and wills it so." When an act of grace is passed which originates in the crown, and to which, in its first stage, the royal assent is given, the clerk of parliament thus expresses the gratitude of the people; "*Les Prelats, Seigneurs, & Commons, en ce present parliament assemblees, au nom de tous vous autres subjects remercient tres humblement votre Majesté, & prient à Dieu vous donner en santé bone vie & longue*;" that is to say, "The Prelates, Lords, and Commons, in this present parliament assembled, in the name of all your other subjects, humbly thank your Majesty," and



“and pray God to give you health, wealth, and long life.”

2. But the King may give his assent by commission, without attending himself. This is done by letters patent, under the great seal, signed by him, and notified in his absence to both Houses assembled in the House of Lords, by certain commissioners appointed for that purpose. A bill thus receiving the royal assent becomes a statute or act of parliament.

V. The only thing further to be mentioned respecting the parliament, is their manner of adjournment, prorogation, and dissolution.

Adjournment of parliament is a discontinuance of sitting from one day to another during the session; as from Friday to Tuesday, or during the Christmas and Easter holidays, and is the act of each House itself: but they sometimes adjourn at the pleasure of the King, who otherwise, on a refusal, could prorogue them: prorogation being a discontinuance of their sitting from one session to another, and is an act of the crown, as adjournment is a discontinuance from one day to another, and is, as before observed, an act of either House. Prorogation puts an end to the session, and then all bills begun and not completed, must, if wished for, be resumed anew in a subsequent session; whereas, after adjournments, things are again taken up in the state in which they were left before adjournment.

Prorogations are declared by the Lord Chancellor in the King's presence, or by commission from the crown, and sometimes by proclamation. Both Houses are prorogued at the same time; but if actual rebellion or imminent danger of invasion should take place, during any adjournment or prorogation of parliament, the King can convene them afresh by proclamation, with fourteen days notice.

A dissolution is the ending of any parliament, and may happen three ways: 1. By the will of the King declared in person or by representation; it being a branch of the royal prerogative to put a period to its existence whenever he pleases; for if parliaments could continue themselves, they might exist for ever, and thus encroach too far on the executive power. 2. By the demise of the crown, that is, the death of the King. This being found inconvenient, and dangerous, lest the succession should be disputed, it is now enacted,

E

That



That on the death of the reigning prince, the parliament then in being shall continue for six months after such death, unless sooner prorogued or dissolved by the successor; if at the King's death it be prorogued or adjourned, it shall assemble immediately; or, if there be no parliament then in being, the members of the last parliament shall assemble and sit again. 3. By length of time; for long parliaments might become corrupt. Besides, as the House of Commons is formed by the people, a change of men may produce a change of measures, where former measures are disapproved. The same parliament, by the 6 W. & M. c. 2. could sit only three years, but to avoid the expence and trouble of frequent elections, by the 1 Geo. I. st. 2. c. 38. those three years are extended to seven.

### C H A P. III.

#### OF THE KING, &c.

**B**Y the general consent of the people, the supreme executive power is vested in the crown, whether King or Queen, being a single person; the right then and authority of this power shall next be considered, and in the following order: 1. The title of the King; 2. His family; 3. His councils; 4. His duty; 5. His prerogative; and, 6. His revenue.

I. The crown or right of succession is, by constitutional custom, hereditary; but the right of inheritance is subject, from time to time, to be changed or limited by act of parliament; under which limitations the crown still continues hereditary. That is, it is descendible to the next heir, male or female; but this hereditary right implies not a divine indefeasible right; it is unquestionably in the breast of the legislature, King, Lords, and Commons, to defeat at any time this hereditary right, and, by particular entails and limitations, to exclude the immediate heir, and vest the inheritance in any one else; but, however limited or transferred, it still is descendible, and becomes hereditary in the wearer. Hence it is, that the King is said never to die; but on the death of Henry or William, the King survives in the successor. In short, the crown be-  
comes



comes absolutely hereditary, unless by limitation it is otherwise regulated and determined, as in the present family ; it being enacted, That on the exclusion of James II. and his son, that the crown after the death of Mary, Anne, William III. and their issue, should devolve to the princess Sophia of Hanover, youngest and only surviving daughter of the queen of Bohemia, and grand-daughter of James I. and the heirs of her body, being protestants and married to protestants. The present King however is truly descended from the ancient Saxon kings, as may be seen in the histories of this country.

An elective monarchy seems indeed best suited to the rational principles of a free government, as, were the electors to steer clear of faction, prejudice, and corruption, the best, the wisest, and the bravest man would be ever on the throne ; but in the present state of human nature this cannot be expected : to prevent therefore national quarrels, intestine wars, misery, and bloodshed, an hereditary succession to the crown is established in this and most other countries.

II. We will next consider the royal family ; the first and most considerable branch of which is the Queen.

The queen regent is the reigning queen in default of male issue, and has the same powers, prerogatives, rights, &c. as if she had been a king : but the queen consort or the wife of the King has less powers, &c. she has, however, many privileges superior to other married women.

The queen consort is a public person, exempt and distinct from the King, and like a feme-sole or unmarried woman, can, like them, purchase lands and convey them, make leases, &c. without the concurrence of her lord ; she can also take a grant from her husband, which no other wife can ; she can likewise sue and be sued alone ; she has also a separate property in goods as well as lands, and can dispose of them by will : in short, in all legal proceedings she is considered as an unmarried woman : she hath also separate courts and officers distinct from the King's, and her attorney and solicitor-general are in Westminster-Hall entitled to a place within the bar, with the King's counsel. The wisdom of Common Law has



established this to prevent the King's being troubled with his wife's domestic concerns.

The queen hath also many exemptions. She pays no toll, nor is she liable to be tried in any court; but in general she is on the same footing with other subjects, except where the law has expressly exempted her, being to all intents and purposes the King's subject and not his equal.

The person of the queen, though a subject, is equally protected by the law with that of the King. It is high treason to plot against her life; and it is also high treason to violate or defile the queen consort, as well in the violator as in the queen herself, if consenting; and if a queen be tried, it must be by the peers of parliament: but the case is different in the husband of a queen regent, who, though her subject, and may commit treason against her, is not guilty of treason for conjugal infidelity. The reason seems to be, that where a queen consort is unfaithful to the bed of her husband, the heirs to the crown may be debased or bastardised; which cannot happen from the infidelity of the husband to a queen regent.

A king's widow or a queen dowager, is entitled to most of the privileges she enjoyed as queen consort, except that it is not high treason to conspire her death, or to violate her chastity, the succession of the crown being not thereby endangered: yet still, for the royal dignity, none can marry a queen dowager, without the king's consent, under the penalty of forfeiting his lands and effects. But she, though a foreigner, after the king's death shall have dower, which no other foreigner has. If married to a subject, she does not lose her privileges as do dowager peeresses, when married to commoners.

The prince of Wales and his wife and the princess royal also have some peculiar privileges; it is high treason to conspire the death of the former or violate the chastity of either of the latter. More regard is had to the princess royal than her sisters, she being alone inheritable to the crown, on failure of male issue. The heir apparent to the throne is generally *made* prince of Wales and earl of Chester, but being the king's eldest son, he becomes duke of Cornwall by *inheritance*.

By



By the *royal family* is understood the younger sons and daughters of the king and other of the king's relations, not immediately in the line of succession. These have precedence before all peers and officers of state, whether ecclesiastical or temporal, but none except the children of the King have a right to sit at the side of the cloth of state in parliament. The education of the presumptive heir to the crown is now held to be under the care of the King; and by a late act, 12 George III. c. 11, no descendant of the body of King George II. (except the issue of princesses married into foreign families) can marry without the King's consent, unless they are twenty-five years old; nor even then, without twelve months notice being given to the privy council, and if in the course of those twelve months both Houses of parliament express their disapprobation of the match. And a marriage otherwise entered into will be void, and the minister and all persons present incur the penalties of a *præmunire*.

III. The subject next in order is the councils of the King, those councils which the law hath assigned him for the maintenance of his dignity, the exertion of his prerogative, and for assistance in the discharge of his duty.

The first of these councils is the high court of parliament, of which we have already treated. The second are the peers of the realm, who are counsellors of the crown by birth-right, and whom the King may convene for advice, either in time of parliament or not. Peers are entitled to an audience of the King, to lay before him with decency and respect, such matters as they may conceive of importance to the public welfare. In matters of law the judges also are a council; but the principal one is the privy council.

The privy council in number are indefinite, and at the pleasure of the King, who has the sole nomination of them. They are made without either patent or grant, but must be natural-born subjects, and on taking the necessary oaths they sit during the life of the King who nominates them, subject however to removal at his discretion; but to prevent inconveniencies, at the death of the King, the privy council, like the parliament, continue the same for six months after the demise of the crown, unless dissolved by the successor.



A privy counsellor takes an oath on admission, to advise the King without partiality, affection, or dread, to the best of his understanding; to keep the King's counsel secret; to avoid corruption; to assist the execution of what is there resolved; to withstand all who oppose it, and to observe, keep, and do all that a good counsellor to his sovereign ought to do. He is empowered to enquire into all offences against government, and commit the offenders to take their trial in some court of law. But under such commitment the offender is entitled to his *habeas corpus*.

The privy council is a court of appeal in plantation and admiralty causes, which arise out of the jurisdiction of the kingdom; and in matters of lunacy and idiocy; being a special branch of the royal prerogative. Should any questions arise between two provinces in America or elsewhere, respecting their charters or the like, the King in council exercises original jurisdiction on the principle of feudal sovereignty. And so, should an island or province be claimed by any one under any grant from former kings, its determination belongs of right to the King in council. The judicial authority of this tribunal is exercised in a committee of the whole body, who examine into the matter and make their report to his Majesty in council, by whom judgment is given.

The privileges of a privy counsellor are certain protections of his person. It is felony in any of the servants of the King's household, 3 Hen. VII. c. 14, to conspire against his life; and felony without clergy to unlawfully assault or attempt to kill a privy counsellor in the execution of his office; 9 Anne, c. 16.

IV. Next for the duty of the King; this is principally to govern his people according to the laws of the kingdom, which are the birth-right of the people, and in consideration of which his dignity and prerogative are established; it being a maxim in law, that protection and subjection are reciprocal. In his coronation oath, the King swears “ solemnly to govern according to the statutes in parliament agreed on, and the laws and customs of the same; to  
“ cause law and justice in mercy to be executed in all his judgments; to maintain to the utmost of his power the laws of God,  
“ the true profession of the gospel and the protestant reformed religion established by law; to preserve unto the bishops and clergy  
“ of



“ of the realm, and to the church committed to their charge, all  
“ such rights and privileges as by law do or shall appertain unto  
“ them or any of them.”

V. The fifth article to be considered is his prerogative. By *prerogative* is understood, that pre-eminence which the King hath in right of the crown, over and above all other persons, and out of the common course of law.

Prerogatives are either *direct* or *incidental*: *direct*, are those inherent in his political person, without reference to any other circumstance, such as the right of sending ambassadors, of creating peers, and of making war and peace. *Incidental* prerogatives have relation to something else, and are only exceptions, in favour of the crown, to those general laws established for the good of the people: such as, that the King shall pay no costs; that a debt to the crown shall take place of any debt to the subject; &c. These shall be explained hereafter. At present we will consider the *direct* prerogatives, which may be divided into three; such as relate to the *character* of the King, to his *authority*, and his *revenue*. These are requisite to secure reverence to his person, obedience to his commands, and a proper supply to the expences of government; without which the executive power could not be supported in vigor and independence. *First*, then, for the prerogatives that respect the *character* of the King or his royal dignity.

In all monarchies it is necessary to distinguish the prince from his subjects, not only by outside show, but by ascribing to him certain transcendent qualities inherent in him as a King, in order to create in the minds of subordinate persons that awful respect, as may enable him the better to carry on the business of government for the general good. And,

1. The law ascribes to the King *sovereignty* or imperial dignity. He is declared by statutes of Hen. VIII. to be the supreme head of the church and state, to be inferior to no man upon earth, dependent on no man, accountable to no man. Hence it is, that no suit or action can be brought against the King even in civil matters; because no court can have jurisdiction over him: if any one has a demand on the King in point of property, he commonly petitions the court of Chancery, where his chancellor will administer right as a  
matter



matter of grace, not of compulsion: hence it is also, that however tyrannical and arbitrary may be the measures of the people, during any reign, by law the King's person is sacred; no jurisdiction on earth having power to try him, much less to punish him: but as the King cannot well misuse his power without the advice of evil counsellors or ministers, these men may be impeached, examined, and punished. Was it unfortunately to happen that any future prince should endeavour to subvert the constitution, and violate the fundamental laws, the prudence of the times must provide new remedies upon such emergencies.

2. The law also ascribes to the King in his political capacity absolute *perfection*. It is an established maxim that "the King can do no wrong." Which implies two things: 1. That whatever misconduct there is in public affairs, it must not be imputed to the King, nor is he personally answerable for it; and, 2. That his prerogative extends not to do any injury; being created for the good of the people, of course cannot be exerted to their prejudice. Nay, the law will not even admit that the King can even *think* wrong. Hence it is, that where any royal grant or privilege is made to one subject, prejudicial to another, or to the public in general, the law does not suppose that in such grant the King meant wrong, or to act unwisely; but declares the King to have been deceived into such grant, and makes the grant void accordingly.

But, notwithstanding this supposed perfection, the constitution has allowed both Houses of Parliament, and these only, to suppose the contrary, either having a right to remonstrate and complain to the King, even of those acts of royalty that are personally his own; such as messages signed by himself, and speeches from the throne; yet to preserve a reverence to the crown, such messages or speeches are deemed to flow from the advice of administration.

In further pursuit of this principle, it is held by law, that in the King can be no negligence, nor will any omission or delay bar his right: he is ever supposed to be busied for the public good, and therefore not always at leisure to assert his right within the times limited to his subjects. In him there can be no corruption of blood; for should at any time the heir to the crown be attainted of treason or felony, and he should come to possession of the crown, that



that very possession would eradicate the attainder; as was the case of Hen.VII. Neither is the King ever considered as a minor, for his grants and assents are valid, though under the age of twenty-one: but by an act made in the present reign, a regency is appointed by the King to take place as guardians to the crown, should any of the present family come to the possession of it before the age of eighteen.

3. A third attribute ascribed to the King is *perpetuity*. In his political capacity, the King can never die, for instantly on the death of the reigning prince the crown or royal dignity is vested in his heir, without any *interregnum*. Hence the death of the prince is called the *demise* or transfer of the crown.

*Secondly*, Let us treat of the King's *authority* or power.

The executive power of government is wisely placed in a single hand, for the sake of unanimity, strength, and dispatch: if in many hands, it would be liable to caprice, to weakness, and delay. The King is therefore chief and sole magistrate of the nation, every other acting under him by commission and deputation. In the exercise of his lawful prerogative he is absolute. He may reject any bill he pleases, make any treaty, create any peers, and pardon any offences, except such where the constitution has interfered and limited the prerogative; but if the exertion of this prerogative be extended to the injury or dishonour of the nation, the parliament have a right, and will call his advisers to account: for though the King may enter into a treaty with a foreign power that shall bind this country; yet if such treaty is judged destructive, impeachments will reach those ministers by whose agency or advice it was concluded.

The royal prerogative as we are now considering it, extends either to our intercourse with foreign nations, or the domestic government of our own.

As far as it respects foreign nations, the King is the representative of his people; what is done by the royal authority is the act of the nation, and which the people undertake to ratify; what is done without the King's concurrence is not the act of the people at large, but the act of individuals; for should the whole body of the people make war with a foreign power in league with the King, without the



King's concurrence, such war would be no breach of the league: and any subjects committing acts of hostility on any nation in league with the King, is the highest offence against society and the law of nations, and is severely punishable according to the circumstances of the case.

1. Sending ambassadors to foreign nations, and receiving ambassadors at his own court, is a power vested solely in the King.

As such ambassadors represent the persons of their respective sovereigns, who owe no subjection to any laws but their own; the actions of an ambassador are not subject to the controul of the private law of the state where he resides. If he commits any crime, or makes an ill use of his character, he may be sent home and accused before his master, who is bound either to do justice upon him or stand forth the accomplice of his crimes. But if an ambassador conspires the death of the King in whose country he is, he may be condemned and executed for it.

In civil causes, by 7 Ann, c. 12. neither the ambassador, nor any of his domestics or train, can be prosecuted for any debt or contract in that kingdom where he is sent to reside, with the following exceptions; that no trader within the description of the bankrupt laws, who shall be in the service of any ambassador, shall be privileged or protected; nor shall any one be punished for arresting an ambassador's servant, unless his name be registered with the secretary of state, and by him transmitted to the sheriffs of London and Middlesex.

2. Making of treaties, leagues, and alliances with foreign powers is also vested in the King, as was before observed. And likewise,

3. The sole power of making war and peace; and that the war is not undertaken by private persons, but is the act of the whole nation left to the will of the King, declaration of war usually precedes the commencement of hostilities: the same measures are taken in making of peace. But as the delay in making war may sometimes be injurious to individuals who may have suffered by foreign depredations, our laws have in some respects impowered the subject to impel the prerogative, by directing administration to issue letters of reprisals upon due demand. The sufferer must first apply to the Lord Privy Seal for letters of request, that the offending party make satisfaction, which if not done in proper time, the Lord Chancellor  
issues



issues letters of marque under the great seal, empowering the aggrieved party to attack and seize the property of the offending nation, without hazard of being condemned as a robber or a pirate.

4. Upon these grounds stands the prerogative of granting safe-conducts. Great tenderness is shewn by our laws, not only to foreigners wrecked on the coast, as we shall speak of hereafter, but also to the admission of strangers who come voluntarily; but no subject of a nation at war with us, can by the law of nations come into the realm, nor pass upon the seas, nor send his merchandize or property from place to place, without danger of being seized by us, unless he has letters of safe-conduct, which must be granted under the King's seal and enrolled in chancery. But passports signed by the King or licences from his ambassadors abroad are now held of equal validity.

So far for the King's prerogative in matters of national intercourse with each other. In domestic matters, he has a variety of other prerogatives, as,

1. He is one part of the legislative power, and has the power of rejecting such bills in parliament as he judges improper to be passed: nor is the King bound by any act of parliament, unless he be particularly named therein, except an act be made for the preservation of public rights and suppression of public wrongs, and does not interfere with the established right of the crown; but though not named in any particular act, he may, if he pleases, take the benefit of such act.

2. The King is considered as the head of the army, and by 13 Car. II. c. 6. has the sole power of raising and regulating fleets and armies, of which more by-and-by. This power extends also to forts and other strong places within the realm, the erecting, manning, and governing which belongs to him. He is likewise invested with the power of appointing ports and havens for persons and merchandize; of erecting beacons, light-houses, and sea-marks, which erections the Trinity House is now authorized to make where necessary, and if the owner of the land shall remove or destroy any steeple, tree, or other known sea-mark, he forfeits one hundred bounds, or is out-lawed.



The King may also prohibit the exportation of arms or ammunition out of this kingdom under divers penalties, and may confine his subjects within the realm, or recall them when beyond the seas, on pain of fine and imprisonment when they return ; because all men are bound to defend the King and the nation.

3. The King is also considered as the distributor of justice and the general preserver of the peace. He therefore has the sole right of erecting courts of judicature. Hence it is, that all proceedings run in the King's name, pass under his seal, and are executed by his officers. In very ancient times our Kings sat as judges ; but for many ages they have delegated this power to others, who hold their commissions from the crown during their good behaviour, which is generally understood for life ; 1 Geo. III. c. 23.

In criminal proceedings, all offences are either against the King's peace or his crown and dignity, for the public being an invisible body, and he their visible representative, all affronts to that body are offences against him ; he is therefore the proper person to prosecute ; and as he is to prosecute, so is he to pardon ; for it is reasonable that he only who is injured should have the power of forgiveness. He is always supposed to be present in his courts of law, hence it is, that the King can never be non-suited, a non-suit being a desertion of the cause by non-appearance of the plaintiff.

From the same grounds that the King is the distributor of justice, rises his prerogative of issuing proclamations, which the King only has power to do. When such proclamations tend to enforce the laws in being, they are binding on the subject, but not otherwise : for example ; by the law, the King may forbid any of his subjects leaving the country ; a proclamation therefore, prohibiting this in general for three or four weeks, by laying an embargo on all shipping in time of war, will be as binding as an act of parliament, because founded on a law in being ; but in time of peace an embargo on all vessels loaded with corn (though in time of dearth) being contrary to statute, would not be binding.

4. The King is also the parent or fountain of honour, office, and privileges. The law supposes that no one can be so good a judge of the abilities and merits of his servants as he who employs them, it has therefore, in confidence that he will bestow no honours or dignities,



nities, but on such as deserve them, entrusted him with the sole power of conferring them. All degrees then of titles are by his immediate grant, either expressed in writing, by writs or letters patent, as in the creation of peers or baronets; or by corporeal investiture, as in conferring knighthood.

All offices under the crown, carrying in the eye of the law an honour with them, implying a superiority of parts and abilities in the persons employed, the disposal of such offices is vested in the King as the fountain of honour; and as the King may create new titles, so may he new offices, with this restriction; that he cannot create offices with new fees annexed, nor add new fees to old offices; for this would amount to a tax on the subject, which rests only in parliament to grant.

The same reasons that allow the King to confer honours and offices, give him the power of conferring privileges, such as granting precedence to particular persons, naturalizing foreigners, and erecting corporations.

5. The King is also considered as the arbiter of domestic commerce: such as having the power of establishing markets and fairs, and specifying their tolls; of regulating weights and measures; and of coining, and giving value and currency to, money: under which last head I shall observe, that by statute of 14 Geo. III. c. 42, it is enacted, “That no tender of payment in silver money exceeding 25 l. at a time, is a sufficient tender in law for more than its value by weight at the rate of 5 s. 2 d. an ounce.” With respect to the value coin is to pass for, it must be ascertained by proclamation: the King may also by proclamation make foreign coin current in this kingdom, declaring at what value it shall be taken in payments; but unless this value be rated in proportion to the intrinsic value of our own coin, it will require the consent of parliament.

6. The King is lastly considered as the head of the church: and it is so ordained by 26 Hen. VIII. c. 1. 1 Eliz. c. 1. By virtue of this prerogative, he convenes, prorogues, restrains, and dissolves the houses of convocation, which are a parliament in miniature; the archbishop of Canterbury presiding with regal state, the upper house consisting of the bishops, and representing the House of Lords, the



lower house, composed of representatives chosen by the several arch-deaconries and chapters, and resembling the House of Commons, with its knights and burgessees.

As head of the church, arises the King's right of nomination to vacant bishoprics and other clerical preferments, and to him is the last appeal in chancery in all ecclesiastical causes, from the sentence of each ecclesiastical judge: but of these more will be said hereafter.

VI. The last thing to be treated of under the present head, is the revenue of the King, vested by our constitution in his person, in order to maintain his power and support his dignity; and this revenue is of two kinds, *ordinary* and *extraordinary*. The ordinary revenue is that which has subsisted in the crown time immemorial; or else has been granted by parliament in exchange for some hereditary revenues as were found inconvenient to the public.

Parts of this ordinary revenue have been granted by different Kings to the public use, which has made the crown in some measure dependent on the people for its support.

1. The first branch of this revenue is the custody of the temporalities, or those lay lands and tenements which belong to the sees of bishops. These, on the vacancy of the see, are the property of the King, till a successor is appointed; and the King may, by a statute in Edward III's reign, lease the temporalities to the dean and chapter, reserving to himself all advowsons, escheats, and the like; but by customary indulgence this revenue is reduced to nothing; for now, as soon as the new bishop is confirmed, he receives from the King, on paying homage, the temporalities of his see, untouched.

2. Out of every bishoprick, the King is entitled to a corody, as it is called, that is, he may send one of his chaplains to be maintained by the bishop, or have a pension from him, till that bishop promotes him to a benefice; a kind of acknowledgment to the King as founder of the see; but this custom is fallen into disuse.

3. The crown is also entitled to tithes arising in extra-parochial places, which the King holds, as it were, in trust to be afterwards distributed for the good of the clergy in general.

4. The



4. The King is further entitled to the first-fruits and tenths of all spiritual preferments. These first-fruits were the whole profits of the first year, according to a rate made in the 38th of Hen. III. and afterwards advanced in 1292, and were part of a papal usurpation over the clergy of this kingdom. The tenths were a tenth part of the annual income of each living, by the same valuation, claimed also by the holy see. In the reign of Hen. VIII. it was annexed to the crown, and that valuation made by which the clergy are now rated. All benefices however under 50*l.* clear yearly value are by statutes of Queen Anne discharged of the payment of first-fruits and tenths, and what the crown receives, by her bounty, is vested in trustees for ever, as a perpetual fund for the augmentation of poor livings.

5. The fifth branch of the revenue consists of the rent and profits of the demesne lands of the crown, that share of land reserved to the crown by the original distribution of landed property, or such as it acquired afterwards by forfeitures: these are divers manors and lordships, many of which have been since granted away to private persons; but the parliament having interfered, the crown can now make grants or leases only for three lives or thirty-one years, except in houses, which may be granted for fifty years; nor can the crown grant a reversionary lease, during the existence of the running one, for a longer time than eleven years; so that at the expiration of such crown leases, the public may reap some benefit.

6. The King had also a revenue arising from military tenures, and from purveyance and pre-emption, which was a power of buying up provisions for his household at one appointed valuation, in preference to others, and even without the owner's consent; Charles II. resigned these claims, for which the parliament settled on him and his successors fifteen pence a barrel on all beer and ale sold in the kingdom, and a proportionable sum on other liquors, as will be mentioned by-and-by.

7. A seventh revenue arising from wine licences was settled on the crown in the 12th of Charles II. but this was abolished under George II. and 7000*l.* a year issuing out of the same duties was given instead.



8. An eighth branch arises from certain fines imposed upon offenders in the courts of justices, by forfeitures of recognizances; fines upon defaulters, and from certain fees due to the crown in a variety of legal matters; such as putting the great seal to charters, writs, &c. but these have been almost all granted out to private persons, or appropriated to particular uses, so that very little of them comes into the exchequer. By 1 Ann, stat. 2. c. 7. however, no future grant can be made of them for any longer term than the life of the prince who grants them.

9. A ninth is the royal right to whales and sturgeon thrown on the shore or caught on the coast, in consideration of the King's protecting the seas from pirates.

10. Another is that of shipwrecks, founded on the same reasons; but as this would be plundering the distressed, subsequent acts have enacted, That if a man, a dog, or a cat escape alive, the vessel shall not be deemed a wreck. Nay if any one can prove a property in the goods driven on shore, they shall not be forfeited: the sheriff of the county is to keep them a year and a day (if of a perishable nature to sell them) and to restore the property to the right owner or his representative claiming them within the said time. And, from humanity to the owners, it is enacted by 12 Ann, stat. 2. c. 18. 4 Geo. I. c. 12. That all head officers and others of towns near the sea, shall, on application, summon as many hands as are necessary, and send them to the relief of the vessel, on pain of forfeiting 100l. for which assistance, salvage or recompence shall be paid by the owners, according to the assessment of three neighbouring justices. All persons secreting goods from a wreck shall forfeit treble value; and if they wilfully do any act, whereby the ship is lost or destroyed, they are guilty of felony, without benefit of clergy. Plundering any vessel, either wrecked or in distress, whether any living creature be on board or not, or preventing the escape of any one endeavouring to save his life, or wounding him with a design to destroy him, or putting out false lights in order to bring any vessel into danger, are capital offences; and pilfering any goods cast on shore is petty larceny. 26 Geo. II. c. 19.

11. The King has, in the eleventh place, a right to gold or silver mines, to furnish himself with materials for coinage; and by statute,



statute, if any quantity of gold or silver is mixed with the ore of any other mine, except it be tin ore in Devon and Cornwall, the King may have it on paying for the ore mixed as it is, a price stated in the acts, 1 W. & M. st. 1. c. 30. 5 W. & M. c. 6. by which means owners of mines do not lose their property.

12. For the same reason, the King is entitled to treasure-trove, that is, to any money, coin, gold, silver, plate, or bullion found hidden in the earth or other private place, the owner of which is unknown. But if found in the sea, or upon the surface of the earth, it is the property of the finders (the owner being supposed to have relinquished his property in it) unless the owner proves that the loss was by accident.

13. Waifs, or goods stolen and thrown away by the thief in the night, for fear of being detected, are also given to the King as a punishment to the owner for not pursuing the felon; but if the owner do his best to apprehend him, or procure evidence to convict him, he is entitled to his goods again. Nor do they belong to the King, unless seized by some one for him, before the owner seizes them. Goods hidden by a thief, or deposited in any place, are still the property of the owner; the King only claiming such as are thrown away. For the encouragement of trade, the goods of a foreign merchant in the same predicament are not liable to the King's claims, he being supposed also to be a stranger to our laws, which enjoins a pursuit of the felon.

14. Estrays, or strayed cattle, were also the property of the King, I mean animals whose owner is not known, and which are found wandering in any manor or lordship: but by special grant from the crown they now most commonly belong to the lord of the manor; but to be the property of the lord, they must be proclaimed in the church and two market towns next adjoining to the place where they are found, and should they not be claimed within a year and a day after such proclamation, they belong to the King or his grantees. If claimed by the owner within the time, he must pay the charges of finding, keeping, and proclaiming them. Swans may be estrays, but no other fowl. Hence the swan is called a royal fowl.



15. The next branch of the King's revenue arises from forfeitures of lands and goods for offences, that is, property confiscated.

A deodand is another kind of forfeiture arising from the misfortune of the owner rather than his crime, and is that personal property, whatever it be, which occasions the death of a rational creature. This forfeiture was formerly applied as an expiation, to pay for masses for the soul of the person killed, but is now given to the King for pious uses, and is distributed in alms by his almoner. If an adult person falls from a thing not in motion, as a cart or horse standing still, the cart or horse is forfeited; but not so, if the person killed be an infant, the law supposing a child free from actual sin, not in want of masses to be said for its soul: but if a horse, an ox, or other animal kill either an infant or an adult; or if a cart run over him, they are in either case forfeited, rather as a punishment for the negligence of the driver. Where a thing not in motion occasions a man's death, that part only is forfeited which is the immediate cause, as the wheel only of a cart on which, suppose, the person was climbing; but if the thing be in motion, not only that part which gives the wound (the wheel, for example, that runs over the body) but all that moves with it and helps to increase the wound is forfeited; the cart and loading, for instance, which increase the pressure of the wheel. It matters not whether the owner was concerned in the accident or not; for if one man shoot another with my gun, the gun is forfeited as an accursed thing. No deodand is due unless presented and found by the grand jury, nor for any accident at sea, that being out of the jurisdiction of the Common Law; but it is said that a ship, by a fall from which a man is drowned in fresh water (but not the lading) is forfeited. 1 *Haw.* 66. Juries have, however, of late taken on themselves to mitigate these forfeitures, by finding only some trifle, or some part of an entire thing, to have caused the death; and the court of King's Bench has generally refused to interfere, on behalf of the lord of the manor, (to whom these are chiefly granted by the King) to assist a claim in its nature so odious.

16. A sixteenth branch arises from escheats of lands, owing to a defect of inheritance, that is, where there is no heir to the estate, it falls



falls to the King, the original proprietor of all the lands in the kingdom.

17. The last branch consists in the custody of idiots, or those born without the use of reason. The care of these unhappy persons and their estates, is given to the King as the general conservator of his people, to prevent a waste of the estate, to the injury of the next heir. This branch of the revenue has been long considered as a hardship on private families; but as the King cannot take the estate, till a jury of twelve men has found the owner an idiot from his birth, it seldom happens, that they consider him as such, but *non compos mentis* from some particular time, which in law operates very differently.

A person is never deemed an idiot, that hath any glimmerings of reason, that can tell his parents, his age, or the like. But a man born deaf, dumb, and blind is considered as an idiot, wanting those senses that furnish the mind with ideas.

A lunatic or one *non compos mentis*, is one who has lost his understanding by disease or some other accident; or who has had the misfortune to lose his sight, his hearing, and his speech, or indeed such as the court of Chancery deems incapable of managing his own affairs. To those the King is guardian, and under him the Lord Chancellor. On an application to him for a commission of lunacy against any person, a writ is issued out to inquire into the state of the party's mind, and if he be found *non compos*, the care of his person is usually committed to some friend, with a suitable allowance for his maintenance, and the care and management of the estate to the next heir, accountable however to the court of Chancery. The next heir is entrusted with the estate, from a supposition, that, for his own interest, he will manage it best; but not with the person of the lunatic, he being interested in his death.

I have now run through the particular branches of the King's *ordinary* revenue, which was formerly very large, and capable of enormous extent; for, since the Conquest, most of the lands in this kingdom have fallen to the crown by escheat, forfeiture, or otherwise; but fortunately for public liberty this hereditary landed property, through a series of impolitic conduct, is come to nothing, and the occasional profits of the other branches are also nearly all



alienated from the crown. To supply the deficiencies of which we are obliged to have recourse to new methods of raising money, in which methods the King's *extraordinary* revenue consists. These extraordinaries are called aids, subsidies, and supplies, and are granted by the Commons of Great Britain in parliament; who, when they have voted the King a supply, and the particular sum, resolve themselves into a committee of ways and means, to settle the method of raising such supply. In this committee any member (though it is chiefly the province of the chancellor of the Exchequer) may propose the tax; and a resolution of this committee, when approved and ratified by a vote of the House, is esteemed final and conclusive.

Taxes are either annual or perpetual. The annual taxes are those upon land and malt.

1. The land-tax is a payment of one, two, three, or four shillings in the pound, according to the annual amount of estates, and every shilling in the pound produces 500,000 l. The method of raising it is, by charging a particular sum upon each county, according to a valuation given in, in 1692, when it was first settled; and this sum is assessed by commissioners appointed in the act, being the principal landholders of the county and their officers. The land in some counties having been more improved than in others, that is, the rents more increased, it unfortunately happens that some counties pay but six-pence in the pound, while others pay four shillings; a fresh valuation of estates ought therefore to be made, that the land-tax may be equal throughout the kingdom. Personal estates, as well as real, are liable to this tax. And by the act of union, when the land-tax in England amounts to 2,000,000 l. which is when it is at four shillings in the pound, Scotland is to raise 48,000 l.

2. The other annual tax is that on malt, which by a duty of six-pence *per* bushel, and a proportionable sum on cyder and perry, which might otherwise lessen the consumption of malt, raises 750,000 l. An additional duty of nine pence *per* bushel has been laid on since. This tax is under the management of the commissioners of the excise.

The perpetual taxes are,

1. The customs, or certain duties or tribute paid on the exportation or importation of merchandize, unless where, for particular advantages,



advantages, certain national rewards, bounties, or drawbacks are allowed for particular exports or imports. Foreigners pay a larger proportion than natural-born subjects, to be exempted from which is chiefly owing those frequent applications to parliament for acts of naturalization. These duties are under the commissioners of the customs.

2. The second is the excise duty, in its nature directly opposite to the customs, it being an inland tax paid chiefly in the last stage before the consumption. The tax was first levied on beer, ale, cyder, and perry, since which it is levied on a variety of other articles, *viz.* spirits, printed silks and linens, starch and hair powder, gold and silver wire, carriages, things sold by auction, and traveling in post-chaifes. To these we may add, coffee, tea, chocolate, and cocoa paste, all made wines, paper and pasteboard, malt, vinegar, and glass, hops, candles and soap, malt liquors, cyder and perry, leather and skins. These are all under the controul of the commissioners of excise.

3. A third branch of the King's extraordinary revenue, is a tax of four shillings and two pence on a bushel of salt, and conducted by commissioners of its own.

4. A fourth branch is the money charged for the delivery of post letters, under the management of two post-masters.

5. A fifth branch consists of the stamp-duties, under the government of certain distinct commissioners. It is a tax on all parchment and paper, whereon any legal proceedings or private instruments of almost any kind are written; and also upon wine licences, almanacks, news-papers, advertisements, pamphlets containing less than six sheets of paper, cards, and dice. These duties vary, according to the thing stamped, from one penny to ten pounds. Though this is a tax heavily felt, it is of service to the public, by authenticating deeds, which cannot be so easily counterfeited; the stamps being often varied, and having marks perceptible only to the stamp office.

6. Another branch is the duty on houses and windows, a tax levied, though in a different way, as early as the Conquest. The duty now is three shillings on every house (except cottages) and a tax on all windows in such houses, exceeding six; and power is  
given



given to surveyors to inspect the outside of houses, and pass through any house or court-yard twice a year for the purpose. This branch is conducted by the commissioners of the land-tax.

7. Another is a tax of one guinea yearly on every man servant in livery, and two guineas on servants out of livery, except such as are employed in husbandry, trade, or manufactures. This duty is of very late date, and is under the regulation also of the commissioners of the land and window tax.

8. An eighth branch arises from licences to one thousand hackney coaches, and four hundred chairs, and is under distinct commissioners of its own.

9. The last branch is a duty of one shilling in the pound over and above all other duties, on all salaries, fees, and perquisites of offices and pensions payable by the crown, under the direction of the commissioners of the land-tax.

The neat produce of these nine branches amounts annually to about ten millions, clear of all expence, which is chiefly appropriated to pay the interest of the national debt.

This debt has from time to time accumulated since the Revolution, from the great expences the nation has been put to, more than its revenues could discharge, in maintaining long wars; securing the Dutch; reducing the French monarchy; settling the Spanish succession; supporting the house of Austria; defending the liberties of the Germanic body, and other purposes. Hence the legislative power were obliged to borrow large sums of money upon the faith of the nation, for which they now pay interest: but the principal of which there is little expectation of ever paying off, it amounting to upwards of 200 millions, the annual yearly interest of which, with the charges of management, is upwards of six millions, and although the taxes raised to support this yearly expence are very uncertain, depending upon contingences, such as exports, imports, and home consumptions, they have always been considerably more than sufficient to answer the charge upon them. The surplus is called the *sinking* fund, being designed to sink or lessen the national debt, by paying off, from time to time, such portions of it as this fund is capable of doing, and is at the disposal of parliament.



Besides the interest of the national debt, a clear annuity of 900,000*l.* is appropriated to the purposes of the civil list, that is, to support the King and his household. The King's hereditary revenues having in the last reign amounted annually to near a million, and his Majesty having voluntarily proposed to accept an annuity of 800,000*l.* in lieu of them; to raise this sum therefore the funds stand charged with the amount; but 800,000*l.* being found not sufficient, it was in 1777 encreased to 900,000*l.* The public however is still a gainer, by this measure, of near 100,000*l.* a year.

Thus have we seen, in a regular series, the prerogatives of the King, and his revenue both ordinary and extraordinary; which chalks out the great outlines of one branch of the state, the supreme executive magistrate, whose power, by the by, stands much more restrained and limited than it did in the reign of James I. for under Charles I. the courts of High Commission and Star Chamber were abolished; martial law was disclaimed, and also the power of levying taxes on the subject without the consent of parliament. The forest laws have been in disuse for more than a century past. Under Charles II. military tenures, purveyance, and pre-emptions, oppressions on the people, were given up; the *habeas corpus* act established and the duration of parliaments shortened. And since the Revolution, our liberties have been further confirmed by the bill of rights and act of settlement, by the exclusion of certain officers from the House of Commons, by making the judges independent and restraining the King's pardon from obstructing parliamentary impeachments.

But, then on the other hand, the national debt and great increase of taxes have thrown an additional weight of power into the hands of the crown; the collection and management of so vast a revenue having given rise to such a multitude of new officers created and removable by the King, without any reasons assigned, as extend his influence to the remotest parts of the country. To this may be added, the frequent opportunities of conferring benefits, by preference in loans, subscriptions, contracts, and other money transactions; and also the officers of the army, navy, forts, &c. all which put together, and most of which being new, since the Revolution in 1688, will amply atone for any loss of external prerogative.



## CHAP. IV.

## OF SUBORDINATE MAGISTRATES.

HAVING considered the supreme legislative power, and the great executive magistrate, the King, we come now to subordinate magistrates; I mean such as have jurisdiction and authority in different parts of the kingdom, *viz.* sheriffs, coroners, justices of the peace, constables, surveyors of highways, and overseers of the poor: and first, for the sheriff.

1. The sheriff is an officer of great antiquity in this kingdom, and was formerly chosen by the inhabitants of the county, as those of Middlesex are by the city. In some they were hereditary, as at present in Westmoreland; but the custom now is, that all the judges and other great officers meet in the exchequer chamber on the morrow of St. Martin, and propose three persons to the King, one of whom he afterwards appoints to be sheriff. They are to continue in office only one year; the King's writ runs *durante bene placito*, during the King's pleasure. Therefore, till a new sheriff be appointed, the office of the old one does not cease, but with his own death, or that of the King; in which last case, by 1 Ann, stat. 1. c. 8. all officers appointed by the preceding King hold their offices for six months after his death, unless removed by his successor. By 1 Richard II. c. 11. also, no man, who has served the office for one year, can be compelled to serve again within three years after.

The sheriff is, in his official character, a judge, a keeper of the peace, a ministerial officer of the upper courts of justice, and the King's bailiff.

As a judge, he hears and determines, in his county court, all causes of forty shillings value and under; he has also a judicial power in other civil cases. He decides elections of knights of the shire (subject to the controul of the House of Commons) of coroners and verderors; he judges of the qualifications of voters, and returns such knights as he shall think properly elected.

As



As keeper of the peace, during his office, he bears the first rank in the county, superior to any nobleman therein. He may apprehend and commit to prison all persons breaking the peace or attempting it, and may bind any one over to keep it. He is bound to pursue, apprehend, and commit all felons and other criminals: he is also, in invasions, to defend his county against the enemy, and for this purpose he may raise the *posse comitatus*, that is, he may command the people of his county to attend him; and every person above fifteen years of age and under the degree of a peer, is bound to obey his summons, on pain of fine and imprisonment; but by the express directions of *Magna Charta*, he cannot try any criminal offence, nor can he, during his office, act as a justice of the peace.

As a ministerial officer of the upper courts of justice, he is bound to execute all their processes. In civil causes, he, or his substitutes, serves the writ, arrests, and takes bail, summons and returns the jury, and sees the judgment of the court carried into execution. In matters criminal, he also arrests and imprisons, returns the jury, has custody of the criminal, and executes the sentence of the court, even in cases of death.

As king's bailiff, he is to preserve the King's rights within his county; to seize to the King's use all lands devolved to the crown by attainder or escheat; levy all fines and forfeitures; seize and keep all waifs, estrays, wrecks, and the like, unless granted to some private persons; and if commanded by process from the Exchequer, must collect also the King's rents within his county.

For the execution of these various offices, he has under him many inferior officers; an under-sheriff, bailiffs, and gaolers, who are bound not to purchase, sell, nor farm their offices, on pain of forfeiting 500 l.

It is the business of the under-sheriff to perform all the duties of the office of sheriff, a very few only excepted, where the personal presence of the high-sheriff is requisite: but, by 23 Hen. VI. c. 8. no under-sheriff shall continue in his office above one year, on pain of forfeiting 200 l. and by 1 Hen. V. c. 4. no under-sheriff or sheriff's officer shall practise as an attorney, during his continuance in office. But these regulations are evaded by practising in the names



of other attornies, or by puttning in sham deputies, as nominal under-sheriffs.

Bailiffs, are either bailiffs of hundreds or special bailiffs. Bailiffs of hundreds are appointed by the sheriff over certain districts called hundreds; to collect fines, summon juries, attend the judges and justices at assizes and quarter-sessions, and serve writs and process in the several hundreds; but as these, for the most part, are plain, artless men and not sufficiently skilled in serving writs and executions, special bailiffs are usually joined with them, men who from low cunning and dexterity are better adapted to this part of their offices; but the sheriff being responsible for their conduct, they generally give security for their trust.

Sheriffs are also answerable for the conduct of gaolers, who are likewise their servants. The gaoler's business is to keep in safety all who are committed to his custody, and if he suffers any such to escape, if it be a criminal matter, the sheriff shall answer to the King; if a civil, to the party injured. For this reason the sheriff is always chosen from men of property, that he may be able to make satisfaction. The ill conduct of gaolers and bailiffs towards their prisoners are guarded against by 32 Geo. II. c. 28. and provisions are made by 14 Geo. III. c. 59. for preventing the gaol distemper. To lessen the great expence which custom had introduced in serving the office of sheriff, it is enacted by 13 and 14 Car. II. c. 21. That, except in London, Westmorland, and towns which are counties of themselves, no sheriff shall keep any table at the assizes, but for his own family, nor give any presents to judges or their servants, nor have more than forty men in livery; but for safety and decency, he must not have less than twenty in England, and twelve in Wales, on pain of forfeiting two hundred pounds.

2. The coroner is also an officer of equal antiquity with the sheriff, and derives his name from having to do chiefly in pleas of the crown. The chief justice of the King's Bench is the first coroner, and may, if he pleases, execute the office of one in any part of the realm. In every county of England there are coroners, more or less, usually four, but sometimes six, and sometimes fewer.

He



He is chosen by the freeholders in the county court; having been originally appointed with the sheriff by the people, to preserve the peace, when earls gave up the wardships of counties. It was formerly a high office, none being appointed but men of property, who never were paid for their attendance; it is now got into low hands, men who solicit the office for the sake of the perquisites. The coroner is chosen for life, but may be removed on being made sheriff or verderor, which offices are incompatible with the other: infirmities, sickness, want of sufficient estate, living in an inconvenient part of the county, extortion, neglect, and misbehaviour, are all causes of removal; and by 3 Edw. I. c. 9. If he conceals a felony, not doing his duty, through favour to the misdoers, he shall be imprisoned a year, and be fined at the King's pleasure.

The office of a coroner is, to enquire into the manner of the death of any one who is killed, dies suddenly, or in prison; but this must be on an inspection of the body. For if the body be not found, the coroner cannot sit. He must sit also in the very place where the death happened; and his enquiry is made by a jury from any of the neighbouring towns over whom he presides. If by this inquest any is found guilty of murder, he is to commit the offender to prison for the trial, and also to make enquiry concerning his lands, goods, and chattels, which are forfeited thereby: but whether the killing be murder or not, he must enquire whether any deodand is due to the King or lord of the manor, and must certify the whole of the business to the court of King's Bench, or the next assizes. It is part of his office also to examine into shipwrecks, and certify whether it be a wreck or not, and who is in possession of the goods: also in treasure-trove, who is the finder, and whether any be suspected of having found a treasure and concealed it; for which the concealer may be held to bail, even upon suspicion. If the sheriff be suspected of partiality, or be of kin to either plaintiff or defendant in any suit, process must be awarded to the coroner to serve the King's writs, instead of the sheriff.

3. The next order of subordinate magistrates are justices of the peace; the chief of whom is the *Custos Rotulorum* or keeper of the county records. The lord chancellor or keeper, the lord treasurer, the lord high steward, the lord marshal, and lord high



constable (when such officers are in being) and the judges of the court of King's Bench, by virtue of their offices, and the master of the Rolls, by custom, are general conservators of the peace throughout the kingdom, and may commit or bind over all breakers of it: so may the sheriff and coroner within their own county. Constables, tithingmen, and the like may apprehend and also commit all disturbers of the peace within their own districts, till they give security to keep it.

These justices are nominated by the Lord Chancellor, or by the lord lieutenants of the several counties, and are appointed by the King's special commission, under the great seal. They are jointly and severally empowered to keep the peace; and any two or more may examine into and determine felonies and other misdemeanors: in which number one must be of the *Quorum*, that is, one who has a particular commission, which running thus, *Quorum aliquem vestrum, A. B. C. D. &c. unum esse volumus*, has occasioned such magistrates to be called "of the *Quorum*." Formerly, only a few select justices were of the *Quorum*, men eminent for their skill; but the practice now is to advance them all to that dignity, except some one inconsiderable person, for the sake of propriety. Justices designing to act, sue out a writ of *dedimus potestatem* from the clerk of the crown in Chancery, authorizing certain persons to administer the oath to them; after which they are at liberty to act. The qualification for a justice of the peace is one hundred pounds a year, clear of all deductions, of which he must make oath; and if he acts without such qualification, he forfeits one hundred pounds. No practising attorney, solicitor, or proctor, is capable of acting as a justice of the peace.

Justices are removeable at the King's pleasure, and their office is determinable in six months after the death of the reigning prince: but should they be re-appointed by the successor, they are not obliged to take out a fresh *dedimus*, nor swear to their qualifications anew; nor are they bound to take the oaths more than once in the same reign. Their power also may be suspended by a writ of *superseas*. A new commission also discharges all the former justices that are not named therein: they also lose their power of acting on being, as was observed before, appointed sheriff or coroner.

The



The power of a magistrate is very extensive, and encreases annually, as the several new statutes create objects of his jurisdiction. Indeed so great is the variety of his business, that few gentlemen care to undertake the office, and fewer understand it. The public are so much indebted to those who do, that should a well-meaning magistrate commit an error in his practice, great lenity is shewn him in the courts of justice, and there are many statutes made to protect him in the discharge of his office. Among other privileges, no justice can be sued for any oversights without notice first given him; and all suits begun, end, on tender being made of sufficient amends; but on the other hand, any tyrannical or malicious abuse of his authority, is punished severely; and all persons recovering a verdict against a magistrate are entitled to double costs.

4. Next, for some officers of lower rank, and first, of the constable. As low an office as that of the constable may be supposed, it was at first drawn from the office of Lord High Constable, which was to regulate all matters of chivalry, tilts, tournaments, and feats of arms, which were performed on horseback.

There are high constables and petty constables. The former are appointed at the court-leets of the franchise or the hundred over which they preside, or by the justices at their quarter sessions; and are removeable by the same authority. Petty constables are inferior officers in every town and parish, and subordinate to the high constable of the hundred. They are all chosen by the jury at the court-leet; or if no court-leet be held, are appointed by two justices.

The duty of a constable, either high or petty, is to keep the peace; and for this purpose he has power to arrest, imprison, break open houses, and the like. He may appoint watchmen at his discretion; regulated by the custom of the place, who, being his deputies, are armed with his power. He has also a variety of lesser duties.

5. Let us next consider the surveyors of the highways. In common right, every parish is bound to keep the high roads, that go through it, in repair, unless they belong by tenure or otherwise to some private persons. Parishes neglecting such repairs may be indicted for their neglect; and that some persons might see this business done,  
surveyors



surveyors are appointed by 2 & 3 Phil. & M. c. 8. in every parish, chosen by two neighbouring justices from the substantial inhabitants.

Their duty is to carry into execution a variety of statutes made for the repairs of the public highways, leading from one town to another, which for convenience are now thrown into one statute, 13 Geo. III. c. 78. amended by 14 Geo. III. c. 14. This empowers them to remove all annoyances, or give notice to the owner to remove them, who is liable to penalties on non-compliance: to call together the inhabitants and occupiers of lands, &c. within the parish, six days in every year, to assist in mending the roads: all persons keeping draughts (of three horses or oxen) or occupying lands, being obliged to send a team, for every draught they keep, and for every fifty pounds a year they occupy; persons keeping less than a draught, or occupying less than fifty pounds a year, are to contribute in a less proportion; and all others chargeable, between the age of eighteen and sixty-five, are to work or find a labourer: but they may compound with the surveyors at certain easy rates specified in the act. Every cart-way leading to any market town must be made twenty feet wide, if the fence will permit, and may be increased by two justices, at the expence of the parish, to thirty feet. Surveyors may lay out their own money in purchasing materials for repairs, in erecting guide-posts, and making drains, and shall be reimbursed by a rate to be allowed at a special sessions. In case the personal labour of the parish be not sufficient, the surveyors, with the consent of the quarter sessions, may levy a rate on the parish to assist, not exceeding in any one year, together with the other highway rates, nine pence in the pound; for the due application of which they are to account upon oath. Some part of this highway rate is generally given towards the repairs of turnpike roads within the parish; but there are laws relating particularly to them, and provisions made in those laws for their support.

6. The officers lastly to be considered, are the overseers of the poor. Till the reign of Hen. VIII. the poor subsisted entirely on private charity; but under Elizabeth, overseers in every parish were appointed, who are to be nominated from substantial housekeepers yearly



yearly in Easter week, or within one month after, by two neighbouring justices.

Their duty principally is, to raise competent sums in the parish by a pound rate, for the necessary relief of their own poor; *viz.* the impotent, the old and blind, and such of the poor as are not able to work, and to provide work for such as *are* able and cannot get employ.

To settle what poor belong to any parish, the law has determined that a person becomes a parishioner or gains a settlement by the following means: 1. By *birth*. The place where a bastard child is born is generally its settlement; but not so in legitimate children; for they gain their settlement, 2. By *parentage*, belonging to the parish to which their parents belong; unless they acquire a new settlement for themselves. Now a new settlement may be acquired several ways; as, 3. By *marriage*. A woman marrying a man settled in another parish, changes her own settlement to that of her husband's. If the man has no settlement, and leaves her, or is not able to maintain her, she returns to her former parish. The next method of gaining a settlement, is, 4. By *forty days residence with notice*. For if a stranger comes into a parish and delivers notice in writing to one of the overseers, of his place of abode, and number of his family (which must be read in the church and registered) and resides there forty days after such notice unmolested, he becomes legally settled there. 5. *Renting* a tenement of ten pounds yearly value for a year, and residing forty days in the parish, gains a settlement without notice. 6. So does being charged to and paying public *taxes* and parish levies (excepting those for scavenger, highways, and windows); and, 7. Executing, when legally appointed, any parochial *office* for a whole year, together with forty days residence. 8. Being *hired* for a year, when unmarried and childless, and *serving* a year in the same service; and being, 9. Bound an *apprentice*, give the servant and apprentice a settlement, without notice, in that place wherein they serve the last forty days. 10. Lastly, having an *estate* of one's own, and residing thereon forty days, however small the estate may be, provided it be acquired by act of law, or by descent, gift, &c. is a sufficient settlement; but if acquired by purchase, unless the purchase



chafe money be thirty pounds, and *bona fide* paid, it is no settlement for any longer term than the time we reside thereon; for no one can be removed from his own property.

All persons, not so settled, may be removed to their own parishes, on complaint of the overseers, by two justices, if they shall think them likely to become chargeable to the parish they have intruded on; unless the parish to which they belong will grant them a certificate acknowledging them to be *their* parishioners; but such certified person can gain no settlement by any of the means before mentioned, unless by renting a house of ten pounds a year therein; nor can an apprentice or servant to such a person gain a settlement by such service.

## CHAP. V.

### OF THE PEOPLE.

**F**ROM treating of persons in their public relations, as *magistrates*, we will now consider them as *people*; the first divisions of which is into aliens or foreigners, and natural-born subjects.

Natural-born subjects are such as are born *within* the dominions of the crown of England, and in allegiance to it. Aliens are such as are born *out* of the King's dominions and allegiance.

Allegiance is that tie that binds the subject to the King, in return for the King's protection. The oath of allegiance, which is, "To be faithful and true to the King," implies an acknowledgment of his right to the throne under the act of settlement; engaging to support him to the utmost of the swearer's power; promising to disclose all traitorous conspiracies against him; and expressly renouncing any claim the descendants of the late pretender may have to the crown of England. All persons in any office, trust, or employ under government are obliged to take this oath, and two justices may tender it to any person whom they may suppose disaffected. In short, it may be tendered in court-leets to all persons above the age of twelve, whether natives or foreigners.

But, whether the oath be taken or not, there is an implied allegiance owing from all subjects to their sovereign; the oath being  
only



only an outward declaration of it. Every subject owes it from his birth, for, from his birth, he is under the King's protection. So that whether he is in England or in France, or in any other country; and whether he has resided in such other country, twenty days, or twenty years, if born in England, he owes allegiance to the English crown; it is a debt of gratitude, which no change of time, place, or circumstances can cancel. Hence it is, that Englishmen abroad meet with the countenance and protection of our ambassadors. Nay, it is a principle of natural law, that the natural-born subject of one prince, cannot, by any act of his own, not even by swearing allegiance to another, discharge his natural allegiance to the former. Even usurpers of a throne are entitled to allegiance, during the time they sit on it.

An alien, living in this country, owes the King allegiance during his continuance here; which ceases on his departure. An alien may purchase lands or other estates; but not for his own use, on pain of forfeiture to the King; for property in this kingdom would claim that allegiance to the crown, which in fact he could not pay. Yet, an alien may acquire a property in personal estate, that being of a nature that he may take away with him. Aliens may also trade, as freely as others, subject only to higher duties at the custom-house: they may also recover their personal property at law; may make a will, and dispose of their personal estate. In speaking thus of aliens, I mean such as belong to countries at peace with us; for alien-enemies, during war, have no rights or privileges, but by special favour of the King.

Persons may be born out of the King's dominions, and yet not be aliens; for, by statute, it is deemed, that all children born out of the King's ligeance, whose fathers (or grandfathers by the father's side) were natural-born subjects, are, to all intents and purposes, natural-born subjects themselves; unless their said ancestors were attainted or banished for high treason; or were at the birth of such children in the service of a prince at enmity with Great Britain. Yet so, as that the grandchildren of such ancestors shall not be privileged in respect of the aliens duty, except they be Protestants, and actually reside within the realm; nor shall be enabled to claim any estate or interest, unless the claim be made within five years after the same shall accrue.



Children of aliens, born in England, are deemed natural-born subjects, and are entitled to all the privileges of such.

An alien born, who has obtained letters patent to make him an English subject, is called a denizen. Such may take lands by purchase or devise, which an alien may not; but cannot take by inheritance; for his parent, through whom he must claim, being an alien, could not convey to his son, by any mode whatever; neither, by parity of reasoning, can the child of a denizen, born before denization, inherit from his father; but a child born after, may. A denizen is not excused from paying alien's duty; to be excused which, the alien must be naturalized by act of parliament; but it is a prerogative of the crown to grant letters of denization. No denizen can be of the privy council or either house of parliament, or have any office of trust, civil or military, or be capable of holding any grants of lands, &c. from the crown: 12 W. III. c. 2.

No man can be naturalized but by an act of the British legislature, but by such an act he is put exactly into the situation of a natural-born subject; like a denizen, however, he cannot be a member of the privy council or parliament, nor can he hold offices, grants, &c. under the crown. All bills for naturalization have such a disabling clause in them, and another clause disabling the person naturalized from acquiring thereby any immunity in trade, in any foreign country; except he shall have resided in Britain for seven years next after the commencement of the sessions in which he is naturalized. No person can be naturalized or restored in blood, except he receive the sacrament, one month before the bill be brought in, and except he take the oaths of allegiance and supremacy, in presence of parliament. But previous to naturalization of foreign princes or princesses, these exceptions have been usually dispensed with, by special acts of parliament.

By 13 Geo. II. c. 3. every foreign seaman, who serves, in time of war, two years on board an English ship, by virtue of the King's proclamation, is naturalized, under the like restrictions as in 12 W. III. c. 2.; and by several statutes of Geo. II. and III. all foreigners, Protestants and Jews, residing seven years in any of the American colonies, without being absent above two months at a time; and all foreign Protestants serving two years there in a military capacity, or being three years employed in the whale fishery, without absenting them-



themselves afterwards from the King's dominions, for more than one year, unless their fathers (or grandfathers by the father's side) were attainted or banished the King's dominions, for high treason, or were, at the birth of such persons, in service of a prince at enmity with Great Britain, shall, upon taking the oaths of allegiance and abjuration (or in some cases, an affirmation to the same effect) be naturalized to all intents and purposes, as if they had been born in this kingdom; except as to sitting in privy council or parliament, or holding offices or grants of lands, &c. from the crown, within the kingdoms of Great Britain and Ireland.

## C H A P. VI.

## O F T H E C L E R G Y.

THERE are two divisions of the people; the clergy and the laity. The clergy, being an order of men set apart to attend the service of God, have certain privileges allowed them. A clergyman cannot be compelled to serve on juries, nor appear at court-leets, which almost all other persons are obliged to do. But, if he be summoned on a jury, before ordination takes place, he shall, notwithstanding his orders, appear to be sworn. Neither can he be chosen to any temporal office; as sheriff, bailiff, constable, or the like. During his attendance on divine service, or coming and going, officers are punishable for arresting him in civil suits; but the arrest is good, notwithstanding, if it be not on a Sunday. *Cro. Car.* 602. *Cro. Jac.* 321. 2 *Bulst.* 72. *Watson*, c. 34, p. 344. He ought not to serve in war; 2 *Inst.* 4. is not bound to appear at the sheriff's tourn; 52 *Hen. III.* c. 10. may not be taken into custody by any process, upon a statute staple, or statute merchant, 2 *Inst.* 4. nor on a *capias*, if the sheriff returns, that he is beneficed and hath no lay-fee; (a writ from the bishop in this case compells him to appear) 2 *Inst.* 4. *Degge*, 157. is to be fined only according to his lay-tenement; not after the quantity of his spiritual benefice; *Magn. Chart.* c. 14. nor is he obliged to pay tolls, or other like customs for his goods. 2 *Inst.* 4. *Gibb.* 21. In cases of felony, he shall have the benefit of clergy, without being burned in the hand, and may have it more than once, which no layman can. But, as the clergy



have these privileges, on account of their spiritual avocations, they have also their disabilities; being incapable of sitting in the House of Commons; nor, by 21 Hen. VIII. c. 13, can either rector or vicar take any lands to farm, on pain of ten pounds *per* month to the King, and total avoidance of the lease, except he have not sufficient glebe for the maintenance of his household; nor, upon like pain, can he keep any tanhouse or brewhouse, nor engage in any manner of trade, nor sell any merchandize, under forfeiture of treble value.

There are divers ranks and degrees of clergymen, *viz.* archbishops, bishops, deans, prebendaries, archdeacons, parsons, vicars, and curates.

1. An archbishop or bishop is, by virtue of a licence from the crown, called a *conge d'elire*, elected by the chapter of his cathedral church. This licence is accompanied with a letter containing the person's name the King would have chosen; and if the chapter delay the election above twelve days, the King may nominate and appoint by letters patent, addressing such letter to the archbishop of the province; or, if it be the appointment of an archbishop, to the other archbishop and two bishops, or to four bishops, requiring them to invest and consecrate the person so appointed. After which, the bishop elect shall sue to the King for his temporalities, which the crown possesses during the vacancy, and shall make oath to the King and none other. And if such chapter do not elect the person whom the King appoints, or if such archbishop or bishops refuse to consecrate him, they shall incur all the penalties of a *præmunire*.

An archbishop is the head of the clergy in the whole province, and governs the bishops in such province, as well as the inferior clergy, and may deprive them on lawful causes. The archbishop also has a diocese of his own, where he exercises episcopal jurisdiction, as he does archiepiscopal in his province. On receipt of the King's writ, he calls the bishops and clergy of his province to meet in convocation. To him are all appeals made from inferior jurisdictions within his province; and as an appeal lies to him in person from the bishops in person, so it also lies from the consistory courts of each diocese to his archiepiscopal court. In the vacancy of any bishopric in his province, he is guardian of the spiritualties, as the King is of the temporalities, and he executes therein all episcopal jurisdiction. If an archbishopric be vacant, the dean and chapter are the guardians. The



The archbishop is entitled to present, by lapse, to all livings in the gift of his suffragan bishops, if not disposed of within six months. And when a bishop is consecrated by him, he has a customary privilege of naming a clergyman to be provided for by such consecrated bishop: instead of which, the bishop usually now makes over, by deed, to the archbishop, his executors and assigns, the next presentation of any dignity or benefice in the bishop's disposal, as diocesan, which the archbishop shall choose; which is therefore called his *option*; but such options are not binding on the bishop's successors. If the dignity or benefice does not fall vacant, during that bishop's life or continuance in his see, the option is lost. By custom, it is the privilege of the archbishop of Canterbury to crown the kings and queens of England. He is empowered also, by 25 Hen. VIII. c. 21. to grant dispensations to clergymen to hold two livings, and to grant special licences to marry at any place or time. He has also the privilege of conferring degrees.

A bishop, besides the administration of ordination and other holy ordinances, peculiar to his order, has power and authority to inspect the manners of the people and the clergy, and to punish delinquents by ecclesiastical censures. To this end, he has several courts under him, and he may visit at pleasure every part of his diocese. He appoints a chancellor to hold his courts for him, and to assist him in matters of ecclesiastical law, who, as well as all other ecclesiastical officers, if a layman, or married, must be a doctor of civil law, created so by some university. It is the office also of a bishop, to institute and direct induction to all benefices within his diocese.

Archbishoprics and bishoprics may become void by death, deprivation, or for any very gross or notorious crime, and also by resignation, if the King thinks proper.

2. A dean and chapter are the bishop's council, to assist him with advice, in matters of religion or in the temporal concerns of his see. All antient deans are elected by the chapter, by the King's *conge d'elire*, and letters of recommendation, as in the case of bishops; but in those chapters founded by Henry VIII. the deanery is donative, and the installation merely by letters patent. Some few of the deans are appointed by the bishops of the diocese. The chapter consists of canons or prebendaries, some of whom are appointed by the King, some by the bishop, and some elected by the chapter itself. The dean and chapter,



chapter, being the nominal electors of the bishop, the bishop is their superior, and has, generally speaking, the power of visiting them, and correcting their abuses.

Deaneries and prebends may become void also by death, deprivation, or by resignation to the King or bishop. If a dean, prebendary, or other beneficed clergyman be made a bishop, all the preferments he before held are void, and, on his consecration, the King, by his prerogative, has the next turn of presentation to them; let the patron be who he will.

3. An archdeacon hath, subordinate to his diocesan, an ecclesiastical jurisdiction throughout the archdeaconry, which may be the whole of a diocese or part of it. He is usually appointed by the bishop, and has a kind of episcopal authority, independent of him. He visits the clergy, and has his separate court for hearing ecclesiastical causes, and punishing offenders by spiritual censures.

4. Another order of men among the clergy, and indeed the most numerous, are rectors and vicars.

The rector, or parson (which last appellation is the most honourable title a parish priest can have) has, during his life, the freehold in himself of the parsonage house, glebe, tithes, and other dues. But these are sometimes appropriated, or, from being improperly in the hands of laymen, *impropriated*; that is, the benefice is never presented, but perpetually annexed to the patron of the living, whom the law allows to provide for the church by a substitute, called a vicar. This contrivance originated in the policy of monastic orders of men, who, by consent of the King and the bishop, begged and bought all the advowsons within their reach, appropriating the benefices to the use of their own body, and paying a priest some small stipend for serving the church. And at the dissolution of the monasteries in the reign of Hen. VIII. the appropriations which belonged to those religious houses, were vested in the King, which have been since granted out, from time to time, to private persons.

The officiating minister of these appropriate benefices was in reality no more than a curate or deputy, called *vicarius* or vicar; but that the church might not be ill served, or the vicar suffer by the mercenary disposition of the appropriator, statutes were made to empower the bishop to ordain a competent sum, to be annually paid him, according to the value of the benefice; and to oblige the appropriator



priator to endow the vicarage sufficiently; making such vicar perpetual, and not leaving him at the caprice of the appropriator. Such endowments have usually been a portion of the glebe or land belonging to the living, and those small tithes which the appropriator found difficult to collect.

To become a rector or vicar, there are four necessary requisites: ordination; presentation; institution; and induction. A man becomes either a deacon or a priest by ordination. To be a deacon, a man must be between twenty-two and twenty-three years of age, and to be a priest, twenty-four years of age: no person can be ordained deacon and priest on the same day; nor can a man hold a living till he is ordained priest, or be a bishop till he is thirty years of age. Whilst a man is only deacon, he can quit his profession for any other, but not so, when once ordained priest. None can administer the sacrament but a priest; nor can a deacon preach, without being first licensed by the bishop. If any man obtain orders or a licence to preach by money or corrupt practices, the bishop, on conferring such orders, forfeits forty pounds, and the person receiving them, ten pounds, and is incapable of any ecclesiastical preferment for seven years after.

A patron, to whom the advowson of the church belongs, may present any clerk or clergyman to the bishop of the diocese for institution (or any layman, but he must take priest's orders before his admission) who may be refused by the bishop on several accounts. As,  
1. If the patron be excommunicate and remains in contempt forty days.  
2. If the clergyman presented be an outlaw, excommunicated, an alien, under age, guilty of any heresy or gross immorality, or, insufficient in point of learning.

If an action be brought against the bishop for refusing to institute the person presented, the bishop must assign the cause, which is tried by a jury; if it be want of learning, he may alledge only insufficiency; and the court of King's Bench will write to the metropolitan to re-examine him, and certify his qualifications, and this certificate is final.

Where the bishop does not object, he proceeds to institution, which is investing the priest with the cure of souls. When a vicar is instituted, he takes an oath to reside, unless dispensed with by the bishop; for a vicar cannot have a substitute, being only a substitute himself. In cases where the bishop is himself patron of the living,  
there



there is no need of presentation, the presentation and institution being one and the same act, and called a collation. By institution or collation the living is full, and no further presentation can be made, till a fresh vacancy, at least in the case of a common patron; but where the King is patron, the living is not deemed full till after induction; which is performed by a mandate from the bishop to the archdeacon, who usually issues out a precept to some neighbouring clergyman to do it for him. It is done by giving the priest possession of the church, as by his holding the ring of the door, tolling the bell, or the like. A clerk thus presented, instituted, and inducted is in complete possession; tho' he may enter on the parsonage house and glebe, and take tithes upon institution, but he cannot grant or let them, or recover them by action, till after induction.

The rights of a rector or vicar in his tithes and dues we shall treat of hereafter; but I will just mention the article of residence, on the supposition of which the law calls him an incumbent. By 21 Hen. VIII. c. 13. persons willfully absenting themselves from their benefices for one month together, or two months in the year, forfeit five pounds to the King, and five pounds to any person suing for the same, except chaplains to the King, and chaplains to noblemen during their attendance in the households of such as retain them; and except all heads of colleges, magistrates, and professors in universities, and all students under forty years of age residing there for study. Legal residence is not only in the parish, but in the parsonage or vicarage house, if there be one; if not, the incumbent must hire one in the same or some neighbouring parish.

Livings may be vacated several ways. As, 1. By death. 2. By cession, in taking another benefice; for, by 21 Hen. VIII. c. 13. if any one, having a benefice of eight pounds a year or upwards in the King's books, accepts any other, the first is void, unless he obtains a dispensation, which none can have but a master of arts in one of our universities, who is a chaplain to the King or some nobleman, or the brother or son of a lord or knight, or such as have taken the degree of doctor of divinity or bachelor of law. 3. By consecration; for, as was before observed, when an incumbent is promoted to a bishopric, all his other preferments are void the instant he is consecrated: though by favour of the crown, he sometimes holds his former preferment *in commendam*; that is, a living commended by



by the crown to the care of a clergyman, till a proper pastor is provided: which may be for a time or a perpetuity. 4. By resignation. But this is useless till accepted by the diocesan into whose hands the resignation must be made. 5. By deprivation; for gross crimes, such as treason, felony, heresy, gross immorality; simony; maintaining any doctrine in derogation to the king's supremacy, the thirty-nine articles, or the book of common-prayer; or for neglecting, after institution, to read the liturgy and articles in the church, make the declarations against popery, or to take the oath of abjuration; or for using any form of prayer but that of the church of England; or for absenting himself sixty days in one year from a benefice belonging to a popish patron, to which the incumbent was presented by either of the universities; in all which, and similar cases, the benefice is void, even without any formal sentence of deprivation.

5. A curate is an officiating minister assisting the rector or vicar. Though there are perpetual curacies, where all the the tithes are appropriated, and no vicarage endowed: but the curate is appointed by the appropriator, and continues for life under the licence of the bishop. Bishops may allot such a stipend to a curate, not exceeding fifty pounds a year, nor less than twenty pounds, out of the profits of the living, as he shall judge proper; and oblige the incumbent to pay it, on pain of having the profits of his benefice sequestered. The bishop also can license the curate, and oblige the incumbent to continue him as such, whilst he thinks proper to have assistance in his duty.

So much for the clergy. There are also some inferior ecclesiastical officers, of whom the Common Law takes notice, *viz.* churchwardens, parish-clerks, and sextons.

1. Churchwardens are generally two, and are the guardians of the church and representatives of the body of parishioners. They are sometimes appointed by the ministers, sometimes by the parish, and sometimes by both, each appointing one, as custom directs. They are a kind of body corporate, in favour of the church, may have a property in goods and chattels, and may bring actions for them: if they waste the church goods they may be called to account for so doing; but must first be removed by the parish from their office; as none can call them to account but their successors. As to land or other real property, such as the church itself, the church-yard, &c.



they have no interest therein. If any damage be done, the rector or vicar only shall have the action. Their duty is to repair the church, and make rates, and levy them for that purpose. They also, with the overseers, have the care and management of the poor. They are to levy a shilling forfeiture on all such as do not attend church on Sundays and holidays, and are empowered to keep all persons there in order. They have also a multitude of other lesser parochial powers, committed to their charge by acts of parliament.

Parish clerks and sextons are persons who have freeholds in their offices; and therefore, though they may be punished by ecclesiastical censures, they cannot be deprived by them.

Formerly parish clerks were in holy orders, and some are at this day, appointing laymen to officiate for them. The clerk is generally appointed by the incumbent, though custom in some places gives the appointment to the parishioners. When appointed, he is sworn in by the archdeacon, and often licensed by the bishop.

## CHAP. VII.

### OF THE LAITY.

**T**HE laity may be divided into three distinct states, the civil, military, and maritime. We will begin with the civil state.

I. This includes all orders of men from the highest to the lowest, excepting the clergy, and those included under the states military and maritime.

The civil state, then, comprehends the nobility and commonalty.

1. Of the nobility, the peerage consisting of the Lords Spiritual and Temporal, we have already treated; we have only here to consider their titles.

All titles and degrees of honour are derived from the King as their fountain; it being one branch of his prerogative to create what new titles he pleases: hence it is, that all titles are not of equal antiquity. Those now in use are dukes, marquesses, earls, viscounts, and barons. Earls are the most ancient, and barons the most numerous; most of the peers of superior rank having a barony annexed to their other titles.

The



The right of peerage seems originally to have been annexed to lands, castles, manors, and the like; but peers are now created either by writ, or by patent. Creation by writ or the King's letter, is a summons to attend the House of Peers, by the title of that barony the King is pleased to confer. Creation by patent, is a royal grant of any dignity or degree of peerage. Creation by writ, is the more ancient way; but a person is not thereby ennobled, till he has actually taken his seat in the House of Lords; and some are of opinion that it requires a sitting in two distinct parliaments to confirm it; the surest way therefore and the most usual is by patent, which ensures the dignity of a peer to his heirs, though he should never make use of it himself. Yet, it is not uncommon to call up the eldest son of a peer to the House of Lords, by writ, even in his father's life-time, and in the name of his father's barony. Creation by writ has also one advantage over that by patent, as a peer, created by writ, holds the dignity, to him and his heirs, without any express words in the writ to that purpose; but in letters patent, there must be words to direct the inheritance.

Exclusive of the privileges of a peer, as a member of the Upper House of parliament, or as a privy counsellor, which have been before considered; every peer has, in criminal cases, the privilege of being tried by his peers: and is thus out of danger from the envy or prejudice of the populace. Bishops are not entitled to this privilege, being only temporary peers, and of course not ennobled in blood. By 20 Hen. VI. c. 9. peeresses, either in their own right or by marriage, shall be tried by the peers. If a woman be a peeress in her own right, though she marry a commoner, she does not lose this privilege: but if she is noble only by marriage, by a second marriage with a commoner, she does. If a duchess marries a baron, she is still a duchess, for all the nobility are *pares*, and therefore it is no degradation. A peer, or peeress (either in her own right or by marriage) cannot be arrested in civil suits. A peer, sitting in judgment, gives in his verdict only upon honour. He puts in his answer also to a bill in Chancery, not upon oath, but upon honour; but, if examined as a witness at a trial, he must be sworn. The honour of a peer, in short, is so highly thought of in law, that it is more penal to defame their characters than those of other men; scandal against them, being called *scandalum magnatum*.



A peer cannot lose his rank, but by attainder, or by an act of parliament. In the reign of Edw. III. George Nevil duke of Bedford was degraded by act of parliament, for not having sufficient property to support his dignity: but this is a very singular instance.

There are also several degrees of the commonalty, as may be seen by the following table of precedence, where persons are ranged, according to the rank they bear, either by statute, letters patent, or by antient usage.

|                                         |                                          |
|-----------------------------------------|------------------------------------------|
| The King's children and grand-children. | Secretary of State, if a bishop.         |
| _____ brethren.                         | Bishop of London.                        |
| _____ uncles.                           | _____ Durham.                            |
| _____ nephews.                          | _____ Winchester.                        |
| Archbishop of Canterbury.               | Bishops.                                 |
| Lord Chancellor or Keeper, if a baron.  | Secretary of State, if a baron.          |
| Archbishop of York.                     | Barons.                                  |
| Lord Treasurer,                         | Speaker of the House of Commons.         |
| Lord President of the council,          | Lords Commissioners of the Great Seal.   |
| Lord Privy Seal,                        | Viscounts eldest sons.                   |
| Lord Great Chamberlain,                 | Earls younger sons.                      |
| Lord High Constable,                    | Barons eldest sons.                      |
| Lord Marshall,                          | Knights of the Garter.                   |
| Lord Admiral,                           | Secretary of State, if a commoner.       |
| Lord Steward of the Household,          | Privy Counsellors.                       |
| Lord Chamberlain of ditto,              | Chancellor of the Exchequer.             |
| Dukes.                                  | Chancellor of the Duchy of Lancaster.    |
| Marquisses.                             | Chief Justice of the King's Bench.       |
| Dukes eldest sons.                      | Master of the Rolls.                     |
| Earls.                                  | Chief Justice of the Common Pleas.       |
| Marquisses eldest sons.                 | Chief Baron of the Exchequer.            |
| Dukes younger sons.                     | Judges and Barons of the Coif.           |
| Viscounts.                              | Knights Bannerets, if made in the field. |
| Earls eldest sons.                      | Viscounts younger sons.                  |
| Marquisses younger sons.                | Barons younger sons.                     |
|                                         | Baronets.                                |
|                                         | Knights                                  |



|                                             |                        |
|---------------------------------------------|------------------------|
| Knights Banneret, if not made in the field. | Serjeants at Law.      |
| Knights of the Bath.                        | Doctors graduate.      |
| Knights.                                    | Esquires.              |
| Baronets eldest sons.                       | Gentlemen.             |
| Knights eldest sons.                        | Yeomen or Freeholders. |
| Baronets younger sons.                      | Tradesmen.             |
| Knights younger sons.                       | Artificers.            |
| Colonels.                                   | Labourers.             |

Married women and widows are entitled to the same rank among each other, as their husbands would respectively have borne between themselves, except such rank is merely professional or official; and unmarried women, to the same rank as their eldest brothers would bear among men, during the lives of their fathers. Maids of Honour rank next after barons daughters.

There are four sorts of esquires. 1. The eldest sons of knights, and their eldest sons in perpetual succession. 2. The eldest sons of peers younger sons, and their eldest sons, in like perpetual succession. 3. Esquires created by the King's letters patent, or other investiture, and their eldest sons; and, 4. Esquires by virtue of their office; as justices of the peace, barristers, and others who bear any office of trust under the crown. To these may be added, the esquires of Knights of the Bath, each of which constitutes three at his installation: and all foreign, nay Irish peers; and the eldest sons of all peers of Great Britain, who though titular lords, in the law are only esquires: but no estate, how great soever, will entitle a man to this rank. By gentlemen are understood such as profess the liberal sciences, such as have had also a liberal education, and such as have sufficient fortune to support themselves well, without trade, occupation, or manual labour.

II. The military state includes all the land-forces, or the whole of the soldiery.

A national militia was first established in this country by King Alfred, and continued till the reign of James I. It was revived under Charles II. and the present militia laws are principally built upon the statutes which were then enacted; the general scheme of which is, to discipline a certain number of the inhabitants of every county, chosen by lot, for three years, and officered by the lord-lieutenant, the deputy



puty-lieutenants, and other principal landholders, under a commission from the crown. They cannot be compelled to march out of their own counties, except in cases of invasion or actual rebellion within the realm (or any of its dominions) nor in any case can they be forced to march out of the kingdom. In time of peace, they are exercised for one month in the year; in time of commotion, they are embodied, have the pay of a regular soldier, and are under martial law.

By the Bill of Rights it is declared, that raising or keeping a standing army within the kingdom, in time of peace, unless it be with consent of parliament, is against law; but, of late years, it has been judged necessary by our legislature, to raise an army under the command of the crown, which is *ipso facto* disbanded at the expiration of every year, unless continued by parliament. And it is enacted, by 8 Geo. III. c. 13. that not more than 16235 regular forces, in time of peace, shall be kept in Ireland, though paid by that kingdom.

To keep this body of troops in order, an annual act of parliament is likewise passed to punish mutiny and desertion, &c. This act regulates the manner in which they are to be quartered, and establishes a law martial for their government. Among other things it is here enacted, That if any officer or soldier shall excite or join any mutiny, or, knowing it, shall not give notice to the commanding officer; or shall desert, or lift in any other regiment, or sleep on his post, or leave it before he be relieved, or hold correspondence with a rebel or enemy, or strike, or use violence to, his superior officer, or shall disobey his lawful commands; such offender shall suffer such punishment as a court-martial shall inflict, though it extend to death itself. But this discretionary power of a court-martial is under the controul of the crown.

Soldiers, however close they may be tied to military discipline, have by the humanity of our laws some peculiar advantages. By 43 Eliz. c. 3. a weekly allowance is to be raised in every county for the relief of soldiers that are sick, hurt, and maimed, and the hospital at Chelsea is appropriated to such as are worn out in the service. Officers and soldiers, that have been in the King's service, are by several statutes, enacted at the close of wars, allowed to set up any trade or occupation in any town in the kingdom, except the two universities. And



soldiers, in actual service, may make nuncupative or verbal wills, and dispose of their wages and effects, without those forms and expences the law enjoins in other cases. And no soldier can be arrested for a less sum than ten pounds.

III. The maritime state is very similar to the military. The present condition of our marine is in a great measure owing to the navigation acts, whereby English shipping and seamen have been constantly increased. These prevent all ships of foreign nations from trading with any English plantation, without licence from the council of state. In 1651, the prohibition was extended to England, and no goods could be imported but in English bottoms, or in the ships of that European nation of which the merchandize imported was the genuine growth or manufacture. At the Restoration this very material improvement was made, that the master and three-fourths of the seamen should be English subjects.

Many statutes have been made to supply the navy with men; to regulate them on board, and reward them during the time of and after their service.

1. In order to supply the navy with men, bounties are continually given; but where bounties are ineffectual, recourse is had to impressing; the legality of which, though it has been a matter of some dispute, is certain. Indeed no statute, has expressly given this power to the crown; but as many statutes ancient and modern (particularly one as early as Richard II.) speak of impressing as a practice well known and used without dispute, and provide measures respecting it, there can be no doubt of its legality; and as the power of impressing must lie some where, it must, from the spirit of our constitution, as well as from the frequent mention of the King's commission, reside in the crown.

But there are other means of manning the navy. Parishes may bind out poor boys apprentices to masters of merchantmen, who are protected from being impressed for the first three years; and if impressed afterwards, masters shall have their wages. Great advantages are given to volunteer seamen to induce them to enter into his majesty's service; and every foreign seaman who during a war, shall serve two years on board any ship of war, merchantman, or privateer, is *ipso facto* naturalized.



2. A regular discipline in the fleet is kept up by certain express articles and orders, enforced by act of parliament. In these articles almost every possible offence is enumerated, and its punishment annexed; an advantage which the soldier does not experience, the articles of war not being enacted by statute, but framed from time to time, at the pleasure of the crown.

3. The privileges of sailors are much the same with those of soldiers. Greenwich Hospital is appropriated to the relief of those who are maimed, wounded, or superannuated, and county rates are raised for their support. Seamen have the same privileges with respect to exercising trades and making verbal or nuncupative wills; and no seaman aboard the King's ships can be arrested for a less sum than twenty pounds.

#### C H A P. VIII.

#### OF THE PEOPLE IN THEIR PRIVATE RELATIONS TO EACH OTHER.

THE three great relations in private life, are, 1. That of master and servant; 2. That of husband and wife; and, 3. That of parent and child. To which we may add, being a kind of artificial parentage, 4. That of guardian and ward. We will treat of these in their turns; and first,

I. Of master and servant. In some countries, servitude is a degree of slavery; but the law of England abhors the idea of slavery, and will not endure it within this nation. Inasmuch that it is laid down, that a slave or negro, the instant he lands in England, becomes a free man; that is, the law will protect him in the enjoyment of his person and his property: but the master's right to his service remains as before; service, in this sense, being no more than that state of subjection for life, which every apprentice submits to for a term of years.

There are several sorts of servants, the first of which are menial or domestic servants. The agreement between such and their master arises from the hiring. If this hiring be general, without any particular time limited, the laws construe it for a year; but the agreement may be made for a longer or a shorter term. All unmarried men, between the ages of twelve and sixty, and married men, under



thirty years of age, and also all unmarried women between twelve and forty, having no visible way of living, may be compelled, by two justices, to go out to service in husbandry or certain specific trades: and no master can put away his servant, or any servant leave his master, after being so retained, either before or at the end of his term, without a quarter's warning, unless with the consent of both, or by special agreement, and unless upon reasonable cause to be allowed by a justice of the peace.

A second sort of servants are apprentices, bound usually for a term of years to masters, who are to maintain and instruct them in the trade or business they follow. With such are often given large sums of money, as premiums: but apprentices may be bound to husbandmen, to gentlemen, and others. Children of the poor may be apprenticed out by the overseers of the parish to which they belong, and with the consent of two justices, till they are twenty-four years old; and such persons as are thought fitting are compellable to take them; and it is held that gentlemen of fortune and clergymen are equally liable with others to this compulsion. Apprentices to trades may be discharged on reasonable cause, either at the request of themselves or their masters, at the quarter sessions, or by one justice, with appeal to the sessions; who may direct the master to return a proportionable part of the money given with the apprentice, according to the time he has had such apprentice. Parish apprentices may be discharged in like manner by two justices; but, if an apprentice with whom less than ten pounds apprentice-fee hath been given, runs away from his master, he may be obliged to serve out his time of absence or make satisfaction for the same, at any time within seven years after the expiration of his original contract.

A third species of servants are labourers, hired by the day or week: concerning whom the laws, direct that all persons having no visible effects may be compelled to work, specifying the many hours they must continue at work in summer and winter; punish such as desert their work; empower justices at sessions, or the sheriff of the county, to settle their price of work; and inflict penalties on such as give or exact for work more wages than are so settled.

A fourth species are stewards, factors, and bailiffs, whom the laws regard, as far as their acts affect their masters property.

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By service for a year, if the party hired be unmarried and childless, and by apprenticeship under indentures, a person gains a settlement in that parish wherein he served the last forty days. Persons serving seven years apprenticeship to any trade, have an exclusive right to exercise that trade in any part of England; but as this exclusion of others has been considered as a hard law to many, courts of law now hold, no trades to be within this act, but such as were in being at the time of making it; nor do they hold apprenticeships necessary for trading in country villages; nor do they, if the apprentice has served seven years without being bound, consider the binding necessary; for the statute says, the person must serve *as* an apprentice. 5 Eliz. c. 4.

A master may by law correct his apprentice for negligence or misbehaviour; so as it be done with moderation: but a master or mistress beating any other servant of full age is sufficient cause of quitting them. Servants, workmen, or labourers assaulting their master, or master's wife, shall suffer one year's imprisonment and other open corporal punishment.

For service, all servants and labourers, apprentices excepted, are entitled to wages, according to agreement, if domestics; or according to the appointment of the sheriff or sessions, if they be labourers or husbandmen.

A master may encourage and assist his servant in any action at law against a stranger; whereas such a step in general is an offence. A master may also prosecute a man for beating or maiming his servant; but in such case he must prove a loss to himself upon the trial. He may also justify an assault in defence of his servant; so may the servant in defence of his master; they being interested in the service of each other. If any person hire my servant, knowing him to be mine, and he quits my service accordingly, I can recover damages both against the new master and the servant; provided such master refuses to restore the servant upon demand.

Masters are answerable for the misconduct of their servants, if such misconduct is owing to the master's command, either expressly given, or implied. If a servant commit a trespass by order of his master, not only the master is deemed guilty but the servant also, he not being bound to obey his master, but in things legal and honest. If an innkeeper's servant robs the guests, the master is bound to restitution;



because he should have taken care to have had honest servants. So, if a waiter at a tavern sells a man bad wine, that injures his health, the master must answer for it; for even suffering the waiter to draw and sell it implies a command.

By the same way of reasoning, whatever a servant is permitted to do, in the usual course of his business, is equivalent to a general command. If I pay money to a gentleman's servant, who does not usually receive money for his master, and he embezzles it, I must pay it again; but if I pay it to a banker's clerk, the master is answerable. If a steward lets a lease of a farm, without his master's knowledge, the master must abide by the agreement, this being the steward's business. So a wife, or a friend that transacts business for a man, are considered as his servants in that respect, and he must answer for their conduct. If I usually deal with a tradesman myself, and constantly pay him ready money, I am not responsible for what my servant takes up upon trust; but if I usually send him upon trust, or sometimes on trust and sometimes with money, I am answerable for all he takes up, as the tradesman cannot be supposed to know, when he comes by my order, and when upon his own authority.

If a servant, employed by his master, by negligence does a stranger any injury, the master must make it good. If a blacksmith's servant, for instance, lames my horse in shoeing him, my action is against the master, not against the servant. A master is also chargeable, if any of his family throw any thing out of his house into the street or highway, to the injury of any individual, or prove a common nuisance.

But it is enacted by 6 Ann. c. 3. contrary to what was Common Law, that if it shall happen that any house is set on fire, through the negligence of a servant, the master shall not be answerable for the injury done; but such servant shall forfeit one hundred pounds, to be distributed among the sufferers; and in default of payment, shall be committed to some workhouse, and there be kept to hard labour for eighteen months.

II. The second private relation in life, is, that of husband and wife.

The civil law considers marriage in no other light than as a civil contract, and, like other contracts, allows it to be good, where the parties are *willing* and *able* to contract, and actually *did*, in the proper form and mode.



All persons are able to contract marriage, that do not labour under certain incapacities: such as pre-contract; being too near of kin; too nearly related by marriage; or some corporal infirmities. But these are canonical disabilities, and only make the marriage voidable when brought before an ecclesiastical court: till sentence of separation is past, marriages with such incapacities are considered as valid; for after the death of either party, the courts of Common Law will not suffer the spiritual court to bastardise the issue of such marriage. If a man marries his first wife's sister, and she dies before the matter is taken cognizance of; any children she may have will be legitimate, but the husband may be punished for incest. Any two persons may marry that are not nearer of kin than first cousins; that is, brother or sister's children may contract marriage lawfully.

Legal disabilities of which the civil courts take notice, and which render the marriage null in itself, are, a prior marriage; want of sufficient age; want of parents or guardians consent; want of reason; and not being solemnized in due form.

1. Where there is a prior marriage, another husband or wife living, the second is void of course, and the person, so marrying a second time, is guilty of felony. This crime is called Polygamy.

2. If a boy under fourteen marries a girl under twelve, the marriage is also void, being imperfect; and though they live together to the age of consent, which is fourteen in the boy and twelve in the girl, they may separate if they please, without any sentence of the spiritual court; but if, at the age of consent, they agree to continue together, a fresh marriage is unnecessary. If the husband be of years of discretion and the wife under twelve, either may disagree, and so *vice versa*; for in all contracts both must be bound or neither.

3. A third disability arises from want of consent of parents or guardians; for, by several statutes, a fine of one hundred pounds is laid on every clergyman marrying a couple either without publication of banns, or without a licence, to obtain which the consent of parents or guardians must be sworn to; and by 4 & 5 Ph. & M. c. 8. whoever marries any woman child under the age of sixteen years, without consent of parents or guardians, shall be fined, and suffer five years imprisonment; and her estate, during the husband's life, shall go to the next heir: and 26 Geo. II. c. 33. enacts, that all marriages by licence,  
(for



(for banns suppose notice) where either of the parties is under the age of twenty-one, (not being a widow or widower) without the father's consent, or the mother or guardians, if the father be not living, shall be void.

4. A fourth incapacity is want of reason: for 15 Geo. II. c. 30. has provided, that the marriage of lunatics and persons under phrenzies, (if found lunatics under a commission, or committed to the care of trustees by any act of parliament) before they are declared of sound mind by the Lord Chancellor or the majority of trustees, shall be totally void.

5. A fifth disability is where the contracting parties have not been married according to the proper legal forms: for by 26 Geo. II. c. 33. all contracts of marriage, without solemnization, are declared of no force: and no marriage at present is valid, that is not celebrated by publication of banns, or by licence, in some parish church, or public chapel; unless under a special licence from the archbishop of Canterbury. It is held also to be essential to a marriage, that it be performed by a clergyman.

Marriages are dissolved only by death or divorce. There are two kinds of divorces; the one total, *a vinculo matrimonii*, the other partial only, *a mensa et thoro*. The total divorce must be for some of the canonical causes of impediment, existing *before* marriage, as, in being too nearly related by blood; not rising *after* marriage, as being too nearly allied by such marriage, or as having some corporal imbecility. For in cases of total divorces, the marriage is declared null and void, and the issue of such marriages is illegitimate. But divorce *a mensa et thoro* is partial, and it becomes improper for the parties to cohabit, as in the case of ill behaviour between man and wife, or adultery. In the last indeed, *viz.* adultery, the married couple may be totally divorced, but this must be by an act of parliament.

In partial divorces *a mensa et thoro*, the law allows the wife a maintenance, which is called alimony, and that settled by the ecclesiastical judge; and it is generally proportioned to the rank and quality of the parties. But in cases of elopement and living in adultery, the law allows the wife no alimony.

By marriage, the husband and wife, in law, are one person. For this reason a man cannot grant any thing to his wife, or enter into covenant with her. A woman indeed may be attorney for her husband, for that implies no separation. And a husband may bequeath

any



any thing to his wife by will, as this does not take effect till after his death. The husband, by law, must provide his wife with necessaries, and if she contracts debts for necessaries (but no other than necessaries) he is obliged to pay them. If a wife elopes and lives with another man, the husband is not chargeable even for necessaries, especially if the person furnishing such necessaries be apprized of the elopement. And if a woman elopes from her husband, though she does not go away with an adulterer, or in an adulterous manner, the tradesman trusts her at his peril, and the husband is not bound, unless he refuse to receive her again. *Str.* 875. If the wife be indebted before marriage, the husband shall pay the debt, having adopted her and her circumstances; but if a wife die before such debts be paid, the husband, provided he has not engaged himself to pay them, is not obliged to do it. If a wife be injured in her person or property, she cannot prosecute, but in her husband's name as well as her own, and by his concurrence; neither can she be sued without making the husband defendant. There is one exception to this general rule, that is, where the husband has abjured the realm or is banished; for then he is dead in law. In criminal prosecutions, a wife may be indicted and punished separately, the union between man and wife being only a civil union: but on trials of any kind, they are not allowed to be evidence for or against each other. But where the offence is directly against the person of the wife, this rule has been dispensed with, for by 3 Hen. VII. c. 2. in case a woman be forcibly taken away and married, she may be an evidence against such husband, in order to convict him of felony; being here not accounted his wife, she being married against her own consent.

In the ecclesiastical courts, a woman may sue and be sued, without her husband; man and wife being there considered as two distinct persons. Indeed, in our law, there are some instances in which the wife is separately considered; as inferior to her husband, and acting by his compulsion. All deeds therefore and acts done by her, are void, except they be fines, or the like matter of record, in which case she must be solely and secretly examined, to find out whether her act be voluntary. She cannot by will bequeath lands to her husband, unless under special circumstances; being supposed, at the time of making her will, under his coercion. And in some felonious matters and other crimes of an inferior kind, committed by her, the law excuses



cuses her; but not in murder, or some species of treason. No man can beat his wife, if he does, she may bind him over to his good behaviour, as may the husband the wife; but the courts of law will permit a husband to confine his wife, in case of any gross behaviour.

III. The next and most universal relation in nature is that of parent and child. Children, in the eye of the law, are of two sorts; legitimate and illegitimate.

1. Legitimate children are such as are born in wedlock, or within a reasonable time after, and the duty of parents to such children consists in maintaining, protecting, and educating them.

Maintenance of children is a principle of natural law, an obligation of the highest nature, and the municipal law of this kingdom, among others, enforces it. The father, mother, grandfather, and grandmother of poor impotent persons shall, if able, maintain them, as the quarter sessions shall direct: and if a parent runs away, and leaves his children, the churchwardens and overseers of the parish shall seize his rents and effects, and dispose of them towards their relief. 43 Eliz. c. 2. 5 Geo. I. c. 8. And it is held, that if a mother or grandmother marries again, and was able to keep the child or children before such marriage, the husband shall be obliged to do it; it being a debt of hers which he is obliged to pay: but at her death, the relationship being dissolved, the husband is no farther bound.

No man is bound to maintain his children, unless, through infancy, disease, or accident, they are unable to work, and even then he is only to provide them with necessaries, the penalty on refusing being only twenty shillings a month. But it is enacted, That if any Popish or Jewish parent shall refuse to allow his Protestant child a fitting maintenance, with a view to compel him to change his religion, the Lord Chancellor may oblige him to do what is just and reasonable. 11 & 12 W. III. c. 4. 1 Ann. st. 1. c. 30.

Protection of children is also the duty of a parent. A parent may, by our laws, support his children in any law-suit, without being guilty of the crime of maintaining quarrels. A parent may also justify an assault in defence of his children: nay where a man's son was beaten by another boy, and the father went a mile to beat that boy and revenge his son's cause, and from such beating the boy died, it was held to be only manslaughter. Such allowances does the law make for parental feelings.

Education



Education of children is a farther duty of parents, though not enforced by any existing law. The children of the poor are indeed taken away, when past the age of nurture, from their parents, and apprenticed out, according to their abilities and the advantage of the community. But the rich are left to their own option, whether they will bring them up an ornament or a disgrace to their families. In point of religion, they are, however, under some restriction: for it is enacted by Jac. I. c. 4. and 3 Jac. I. c. 5. That if any person sends a child under his care beyond the seas, either to prevent its good education in England, or in order to enter into or reside in any Popish college, or to be instructed, persuaded, or strengthened in the Popish religion; in such case, besides the disabilities incurred by the child so sent, the parent or person shall forfeit one hundred pounds to the person discovering the offence: 11 and 12 W. III. c. 4. And, by 3 Car. I. c. 2. if any parent or other person, shall send or convey any person beyond sea, to enter into, or be resident in, or trained up in, any priory, abbey, nunnery, Popish university, college, or school or house of Jesuits, or priests, or in any private Popish family, in order to be instructed, persuaded, or confirmed in the Popish religion; or shall contribute any thing towards their maintenance when abroad, by any pretext whatever, the person both sending and sent shall be disabled to sue in law or equity, or to be executor or administrator to any person, or to enjoy any legacy or deed of gift, or to bear any office in the realm, and shall forfeit all his goods and chattels, and likewise all his real estate for life.

The power of parents over their children, allowed by our laws, is not rigorous, but sufficient to keep them in obedience. A parent may correct the child in a reasonable manner, while under age. A father's consent to the marriage of his child, while under age, is absolutely necessary, or the marriage will be void. But a father has no other power over his son's estate, than as his trustee or guardian; for though he may receive the profits of such estate during his son's minority, yet he must account for them when the boy comes of age. He may have the benefit of his children's labour, while they live with him and are maintained by him. The legal power of a father (for a mother is only entitled to respect) over his children, ceases when they arrive at the age of twenty-one: yet, till that time, he has the command of them, and may by will appoint them a guardian. He  
may



may also, during his life, delegate part of his parental authority to a schoolmaster or tutor, who, in consequence of such delegation, may restrain or correct them.

With respect to the duties of children to their parents: to those who gave us existence and protected us in infancy, we naturally owe subjection and obedience, during our minority; honour and reverence ever after; and protection in the infirmity of their age. A child, by our laws, is justifiable in defending the person or maintaining the cause of a parent, and, if of sufficient ability, is bound, in honour and gratitude, to provide for him, though the parent may be wicked and unnatural.

2. In the case of illegitimate children or bastards; the law is somewhat different.

A bastard is one born out of wedlock or before matrimony, or born so long after the death of the husband, that it cannot be supposed to be begotten by him; but this being a matter of some uncertainty; where a widow is suspected to feign herself with child, in order to bring in a supposititious heir to the estate; the presumptive heir may have a writ to examine whether she be with child or not, and if she be, to keep her under restraint till delivered; but if the widow be deemed not pregnant, the presumptive heir shall be admitted to the inheritance, though liable to lose it again, on the birth of a child within forty weeks from the death of the husband. If a man dies, and his widow soon after marries again, and a child be born within such a space of time, as that, by course of nature, it may be the child of either husband; such child may, when arrived at years of discretion, choose which of the fathers he pleases.

The law hath appointed no exact certain time for the birth of legitimate issue by the widow after the death of her husband. 1 *Danv.* 726. In the case of a woman delivered forty weeks and nine days after the death of her husband, the child was deemed legitimate, three physicians having proved that a woman usually goes nine solar months of thirty days each and ten days, that is two hundred and eighty days or forty weeks; and if she wants strength, she may go to the end of ten months or more; and that a perfect birth may be at seven months according to the strength of the mother and child. *Cro. Jac.* 541.

Even children born in wedlock may, in some circumstances, be bastards. As when the husband be out of the kingdom, for above



nine months; but generally, during the marriage or coverture, access of the husband is presumed, unless the contrary be shewn. In a divorce, *a mensa et thoro*, if the wife produces any children, they are bastards; but, in a voluntary separation, the law supposes access of the husband, unless a negative be proved. So, also, if there appears an impossibility of procreation in the husband, as if he be but eight years old, the issue of the wife is bastardized. Likewise in cases of divorce *a vinculo matrimonii*.

The duty of parents to bastard children, is chiefly that of maintenance. When a woman is brought to bed, or declares herself pregnant, and will, before a justice of peace, charge any person, on oath, with having got her with child; such person shall be taken up and committed till he gives security to maintain the child, or appear at the next quarter-sessions to dispute and try the fact. But if the woman dies, or is married before delivery, or miscarries, or is proved not to have been pregnant, the person shall be discharged; otherwise the sessions, or two justices, may charge the mother or the reputed father with the payment of money for the support of the child: and if such reputed father or mother run away from the parish, the overseers, by direction of two justices, may seize their rents and effects, if they have any, to bring up such bastard child. No woman however can be *compelled* to declare who is the father of her child, till one month after her delivery.

Bastards are considered as having no father, nor can they inherit any thing. But a bastard may acquire a surname by reputation. Legitimate children have their first settlement in their father's parish, but illegitimate children in the parish where they are born. In cases of fraud indeed, as where a woman is passing from one parish to another by order of justices, or comes to a parish to which she does not belong, begging, as a vagrant, and drops her bastard there; in the first case the child shall belong to the parish from which the mother was illegally removed; and in the other, if the mother be apprehended for her vagrancy, to the mother's parish. Bastards born in any licensed hospital belong to the parish, to which the mother belongs.

Bastards are heirs to no one, nor can they have any heirs but of their own bodies: a bastard may however be made legitimate and capable of inheriting by act of parliament. If the issue however of a bastard purchase land and die without issue, though the land cannot

descend



descend to any heir on the part of the father, yet, to the heir on the part of the mother (being no bastard) it may; so if the bastard was attainted: for the heirs of the part of the mother, make not any conveyance by the bastard. *Noy*, 159. Considered in a civil light, a bastard has no relation, but yet he cannot marry his mother, sister, or the like. 3 *Salk.* 66.

IV. The last general private relation is, that of guardian and ward.

Of the several species of guardians, the first are guardians by nature, *viz.* the father (and sometimes the mother) of the child; as where an estate is left to an infant, the father is by law the guardian, and must account to his child when he comes of age for the profits; and it is held with respect to daughters, that the father may by will or deed, appoint a guardian to them while under the age of sixteen, and if none be so appointed, the mother shall be guardian. There are also guardians for nurture or bringing up the child, which of course are the father or mother till the infant is fourteen years old; but in the case of an orphan, the bishop of the diocese usually appoints a guardian to take care of his personal property, and to provide for his maintenance and education. There are also guardians in nonage (of which more will be said hereafter) these take place only where the minor is entitled to some real estate in lands, where guardianship devolves on the nearest relation he has, to whom the inheritance cannot descend; as for example, on his uncle by the mother's side, if he inherits from his father, for such uncle can never inherit this estate. Wisely designed, that this guardian may have no interest in the death of his ward. Guardians in socage continue only till the minor is fourteen, for then he may choose his own guardian, provided this guardian was not the appointment of his father, in which case, the guardian keeps his office till his ward is twenty-one.

The power and duty of a guardian and ward, are, for the time, just that of a father and child, with this difference only, that the guardian, when the ward comes of age, is bound to give him an account of all he has on his behalf done, and must make satisfaction for all losses owing to his wilful default or negligence. To prevent therefore disagreeable contests with their wards, guardians of considerable estates account annually to the officers of Chancery, which indemnifies them; as, in case of any abuse of trust, the court will check



or punish them, and sometimes remove them from their office, and put others in their room.

Let us now consider the ward, who is said to be a minor, or within age. The ages of male and female are different, for different purposes. A boy at twelve may take the oath of allegiance; is at years of discretion at fourteen, and may consent or not to marry, may choose his guardian, and if his discretion be proved, may dispose of his personal estate by will; at seventeen he may be an executor; and at twenty-one, is his own master. A girl, at the age of seven, may be betrothed or given in marriage; at nine is entitled to her dower; is at years of maturity at twelve, and may consent or not to marry, and, if proved of sufficient discretion, may give away her personal estate by will; at fourteen she is at years of legal discretion and may choose a guardian; at seventeen may be an executrix, and at twenty-one is her own mistress. Full age in man and woman is twenty-one years completed on the day preceding the anniversary of a person's birth.

A minor cannot be sued, but under the protection and name of his guardian; but he may sue either in the name of his guardian or any friend that will undertake his cause, nay, by means of such friend, minors have filed bills in chancery against their guardians. In criminal cases, a minor at fourteen may be executed for any capital offence, but *cannot* under seven years of age. Between seven and fourteen the period is subject to uncertainty; it depends upon circumstances, as whether they are capable of judging between right and wrong, &c. In civil matters, a minor loses nothing for neglect in demanding his right. Minors cannot alienate their estates; but minor trustees or mortgagees are empowered to convey under the direction of the court of Chancery, the estates they hold either in trust or mortgage; and though a minor can do no legal act, if he is patron of a living, he may present to the benefice when it is vacant. A minor may also purchase lands, but, when he comes of age, he may either agree or not to such purchase without giving any reasons, and his heirs inheriting from him may do the same if he dies a minor. A minor may bind himself apprentice for seven years, and may by deed or will appoint a guardian to his children. Though no contracts a minor makes is binding on him, yet he may bind himself to pay for necessaries and for his education. More will be said of them hereafter.



## C H A P. IX.

## OF BODIES CORPORATE.

HAVING considered the people as individuals, and treated of their personal rights, which die with them, we come next to those rights that never die, but are continued in a kind of artificial persons called corporations or bodies corporate, of which there are a great variety, instituted for the advancement of religion, learning, and commerce.

Corporate bodies are capable of retaining and defending any privileges or immunities granted them, which voluntary associations or assemblies of people could not. They are also capable of holding estates, which they otherwise could not, without endless conveyances from one to another, as often as the possessions are changed. But when a number of men are incorporated, both they and their successors are considered as one and the same person. They have but one will, collected from the majority of the body, and this single will establishes rules and orders for the regulation of the whole, governing as it were this little republic.

Corporations are first either aggregate or sole. The aggregate consists of the union of many individuals; as those of towns, colleges, and chapters; sole corporations consist of one person only and his successors, designed to give them perpetuity, which in their natural persons they could not enjoy. The King, for example, is a sole corporation; so is a bishop; so are some deans; and so is every rector and vicar. The necessity of this measure or institution will appear in considering the rector of a parish. At the original endowment of parish churches, the freehold of the church, glebe, &c. was vested in the rector or parson by the bounty of the donor, with a design that it should be continued to his successors. For was this freehold vested in the natural person of the rector, it might descend to his heir, and be liable to his debts, or at best the heir could only be compelled to convey this right to the succeeding rector. The law therefore has ordained, that though the man may die, the rector shall live on, by making him and his successors, like the King, a corporation.

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There are also lay corporations and ecclesiastical ones. Lay corporations are of two kinds, civil and eleemosynary. The King, for instance, is a civil corporation, to prevent any *interregnum* or vacancy of the throne; for though Edward or William may die, the King survives in his successor. Other civil lay corporations are those erected for the government of towns, as the mayor or commonalty; those established for the advancement of manufactures and commerce, as the trading companies of towns; and those for carrying on certain special purposes, as Churchwardens, the College of Physicians, the Company of Surgeons, the Royal Society, the Universities, &c. The eleemosynary sort are charitable foundations, hospitals, &c. Ecclesiastical corporations are those composed wholly of spiritual persons, such as bishops, deans, archdeacons, rectors, vicars, and chapters.

In the erection of any corporation, the King's consent is absolutely necessary, either implied, or expressly granted. Those which exist at Common Law, as the King, a bishop, a rector, and some others, are supposed to have had the concurrence of former Kings. But corporations of later erection have the King's consent expressly given, either by statute or charter: though statutes in general only empower the King; the erection being an act of his prerogative, seldom encroached upon by parliament. The King may also empower others to erect corporations, as he has done the Chancellor of Oxford, who has incorporated there several companies of tradesmen subservient to the students. Corporations once erected, live by their names, by which names they perform their corporate offices.

The powers and rights of a corporation are, 1. To have perpetual succession. 2. To sue or be sued, &c. by its corporate name. 3. To purchase lands and hold them. 4. To have a common seal, by which it speaks and acts; and, 5. To make bye-laws for its better government; which, if not contrary to the laws of the land, are binding upon that body corporate.

But no trading company is permitted to make any bye-laws, which may affect the King's prerogative or the common interest of the people, on pain of forfeiting forty pounds; unless it be approved by the chancellor, treasurer, and chief justices, or the judges of assize in their circuits, nor even then, if it be contrary to the law of the land.

An aggregate corporation cannot appear in person, of course must appear always by attorney: it cannot maintain or be defendant to an action



action or assault, or such like personal injuries; nor can it, in its corporate capacity, commit personal crimes or be punished for them: though its members may, as individuals. It can perform no personal duties, such as the duties of an executor or administrator, nor can it hold lands for the use of another: neither can it be outlawed, as it cannot abscond: and, as it cannot be arrested, the proceedings to compel a corporation to appear by attorney is by distress on its lands and goods. And as it cannot be excommunicated, having no soul, it cannot be summoned on any account into the ecclesiastical courts.

An aggregate corporation may take goods and chattels for the benefit of themselves, but a sole corporation cannot; as it might create disputes between the successor and executor. In ecclesiastical and eleemosynary establishments, the King or the founder may enjoin rules which they are bound to observe; but lay foundations are not subject to this. Aggregate corporations may have constitutionally a head, as a dean, a warden, a mayor; and can do no one act without such head, except appointing another; but there are aggregate foundations without a head, as the Charter-house, London, where all the members have equal authority. In all aggregate corporations, the act of the majority binds the whole and is considered as the act of the whole, except where the head of any society has a negative voice given him by the founder.

No devise of lands by will to a corporation is good, except left for charitable purposes, 43 Eliz. c. 4. 9 Geo. II. c. 36. and indeed, though by the Common Law they had power to purchase lands, corporations, either ecclesiastical or lay, must now have a licence from the crown to purchase, before they can do it; and even this in all cases is not sufficient. Neither can any spiritual or eleemosynary corporations alienate any lands they at present possess.

All corporate bodies are bound to act up to the end and design for which they were founded and incorporated.

Corporations being liable to frailties and abuses, the law has provided certain persons to visit, inquire into, and correct such abuses. The King is the visitor of the archbishop; the archbishop, of the bishops; the bishops, of all deans and chapters, rectors and vicars, and all other spiritual foundations; and in all lay corporations, the visitors are the founders, their heirs or assigns. The founder of most civil ones is the King, and he exercises this jurisdiction in the court of King's Bench, where  
all



all abuses are enquired into and redressed. In charitable foundations, where the founder has appointed no visitor, it is the office of the bishop of the diocese. In cases where the visitor is under temporary disability, the court of King's Bench will interfere.

Any particular member of a corporation may lose his place in such body corporate, by acting contrary to the laws of the land, or the laws of his society, or he may resign it. And the corporation itself may be dissolved several ways. 1. By act of parliament. 2. By the natural death of all its members. 3. By a surrender of its franchises into the hands of the King. And, 4. By forfeiture of its charter, through abuse of its privileges. In case of the dissolution of a body corporate, its lands and tenements revert to him (or his heirs) who granted them, all its debts are extinguished, and all its claims cease.

## A VIEW



# A VIEW OF THE LAW.

## BOOK II.

### ON THE RIGHTS OF THINGS.

#### CHAP. I.

#### OF REAL PROPERTY.

**H**AVING treated of such rights as are annexed to the persons of men, we proceed to such as may be called their property.

All property was originally possessed by occupancy, that is, he who first seized upon a thing became its owner; and when the owner died or left it, the next person, who took possession of it, claimed it. But when mankind increased in number, craft, and ambition, it became necessary to have a more permanent property, and men found methods of transferring their lands or effects, by giving possession to some other persons; a deed of conveyance implying a desertion of the matter conveyed, by its owner, and the person to whom it was conveyed claimed the property as being the next occupant: but in cases of death, as laws took place, the inheritance devolved to the next of kin; or the former possessor bequeathed it to his friend or relation: there are however some few things that unavoidably remain in common, belonging to the first occupant, and continuing with him no longer than while he keeps possession of them; such as the water which turns his mill, and wild animals.

Objects of property are things, either real or personal; real, are such as are in their own nature immoveable; as lands and tenements; personal, such as may be moved; for example, goods, money, &c.

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There are several sorts of real property; namely, lands, tenements, and hereditaments. Land is what every one knows: tenements imply matters of greater extent; the word being not only applied to houses and other buildings, but to every thing of a permanent nature, that may be holden. Thus it is applicable not only to lands and houses, but to offices, rents, commons, advowsons, franchises, peerage, or other property of the like unsubstantial kind: and as to an hereditament, it includes not only lands and tenements, but whatever may be inherited.

Hereditaments then; for these include every thing, are either corporeal or incorporeal. Corporeal are such as may be seen and felt; incorporeal, such only as are creatures of the mind, and exist only in idea.

Corporeal hereditaments imply substantial and permanent objects, which may be comprized under the word land, such as arable grounds, meadows, pastures, woods, moors, waters covering land, marshes, and heath; also houses and other buildings, which is land built upon: so that conveying land or ground, we naturally convey with it any building standing upon such land.

Under the idea of land is comprized the space above and below it, that space in a direct line above ascending to the clouds; so that none may erect a building to overhang another's ground; and that space under ground, in a direct line towards the centre of the earth. Mines, for example, go with the property of the surface, so that the word land includes not only the surface of the earth, but every thing above it and below it; whether any other thing be mentioned or not.

An incorporeal hereditament is a right issuing out of a corporeal one, and are chiefly ten. Advowsons, tithes, commons, ways, offices, dignities, franchises, pensions, annuities, and rents.

1. An advowson is the right of presentation to a living; he who has the advowson is called the patron. For lords of manors who built churches on their estates and endowed them with land, tithes, &c. had the privilege of nominating whom they pleased, to be the minister of such church, provided he was canonically qualified, which the bishop of the diocese was to enquire into. Now an incorporeal hereditament, cannot be better illustrated than by an advowson, which is merely the right of presenting, of course has only a mental existence, not being to be seen or felt, nor can corporeal possession be had of



of it; for should the patron take possession of the church, or the glebe belonging to it, he intrudes upon the property of another man; tithes are of the same nature. They produce probably a tenth sheaf or a tenth cock, (so does an advowson produce church and land) but tithes being only a contingent right issuing out of lands, can never be visible, or be delivered into bodily possession.

There are a kind of advowsons called Donatives, where the King hath licensed any person to build a church or chapel, and ordains that it shall be in the gift of the patron without presentation, institution, or induction. In which case it is subject only to the patron's visitation. But should the patron once wave this privilege of donation and present to the bishop, and the person presented be admitted and instituted; the advowson will be ever after presentative and not donative any more.

2. The next kind of incorporeal hereditaments are tithes; which are the tenth part of the increase annually arising from the produce of lands, the live stock feeding and growing there, and the personal industry of the inhabitants. There are three species of tithes, viz. predial, mixed, and personal. 1. *Predial* tithes are corn, grass, hops, and wood. 2. *Mixed*, are wool, milk, pigs, &c. being natural products, in part nurtured by care. 3. *Personal* tithes are those arising from trades, fisheries, and the like, of which only a tenth part of the clear gains is due.

Tithes are to be paid for every thing that yields an annual increase, as a profit to the owner; such as grain, hay, fruit, cattle, poultry, &c. but not for stone, lime, chalk, and other substances of the earth.

Tithes have been paid in this country earlier than A.D. 786: and at their first institution the payer might give them to what priests he pleased; but at the division of parishes, the tithes of each parish were allotted to its particular minister: and they are now due to the rector of the parish or the appropriator, who is in fact the parson, being entitled, as we have seen, to the parsonage dues. In some cases, however, there are exemptions, and these arise from composition or custom.

Where persons are exempted from paying tithes by composition, it is by an agreement between the owner of the lands and the parson or vicar, with the consent both of patron and ordinary, that such lands shall be exempted from paying tithes on account of certain adequate



satisfaction made in lieu of them: such agreement implies that the advantage was rather in favour of the incumbent; but no composition made since the thirteenth of Elizabeth is valid, for a longer term than three lives or twenty-one years, an act being passed at that time, to prevent all spiritual persons from making any conveyances of the estates of their churches for any longer time.

Exemption by custom, is where certain lands have been wholly or partially discharged, time out of mind, which is binding upon all parties, and called a *modus*.

A *modus* then, is where by prescription or custom, a particular manner of tithing is allowed. Sometimes money is given in lieu of tithe; sometimes it is settled, that the hay shall be made for the parson, and that he shall have every twelfth cock instead of the tenth, and such like. For a *modus* to be good and sufficient, the following requisites are necessary. 1. It must be certain and invariable; payment of different sums by different people will prove it to be no *modus*. 2. What is given in lieu of tithes must be beneficial to the parson and not to third persons only. Thus a *modus* to repair any part of the church (except the chancel, which is the incumbent's) is not good, it being an advantage to the parish only. 3. It must differ from the thing compounded for; one load of hay in lieu of *all* tithe hay is not valid: for no rector would compound for less than his due. 4. A *modus* for one species of tithe cannot be paid for a tithe of another species; for example, a *modus* of three pence for every milch cow, will discharge the tithe of *milch* cows, but not of *barren* cattle; tithe being due for both. 5. The satisfaction made must be as durable as the tithe itself: thus a *modus* for every inhabitant of a house to pay a certain sum yearly, in lieu of the owner's tithes is not good, for the house may not be inhabited, and then the satisfaction is lost. 6. The *modus* must not be too large: for example, it must not exceed much in value the tithes supposed to be due, when the *modus* was first established, which is supposed to have been as early as the time of Richard the First.

Some are exempt from paying any tithes at all, as is the King, by his prerogative. A vicar pays no tithes to the rector, nor a rector to the vicar; but these exemptions are confined to the King and the clergy: for their tenant or lessee shall pay tithes, though the lands could not be titheable in their own hands. Some monasteries also have been discharged



discharged from paying tithes; and those lands that are now tithe-free have become so, by having been such abbey lands.

3. Right of common is another incorporeal hereditament; being a right one man has in the land of another, such as to feed his cattle, catch fish, dig turf, cut wood, &c.

The soil of those waste grounds called Commons, is the property of the lord of the manor, as in common fields it belongs to particular tenants: for when lords of manors granted out parcels of land to tenants, they gave such tenants a right to feed their cattle upon the wastes. Where the commons of two distinct manors join, so that the cattle on one shall stray upon the other, it is a mutual trespass that cannot well be avoided, unless such commons were divided, and therefore the law winks at it. Such right of common is generally limited as to number and time; but there are commons without stint, open to the tenants all the year. By the statute of Merton, however, and other subsequent ones, the lord of the manor may enclose as much of the waste for tillage or wood ground, as he pleases, provided he leaves sufficient common for those who are entitled to it. No one but the lord has any interest in the soil; but in the common the interest both of lord and commoner is mutual. They may both bring actions, either against strangers or each other; the lord for the public damage, and each commoner for his private loss.

There is in some places also a liberty of fishing in certain waters, and in others, a liberty for digging turf in certain wastes. There is also a common for digging coals, minerals, stones, and the like.

Further; there is a liberty in some places of taking necessary wood from another's estate, for the use of a house, or implements of a farm. This is called estovers or house-bote, plough-bote, and cart-bote. The first is a sufficient allowance of wood to repair houses and for fire; the last two, for wood for making and repairing implements of husbandry. These botes any tenant may take off the land without leave, unless he be restrained by special covenant.

4. Ways, or the right of going over another man's ground, is a further species of incorporeal hereditament. The King's highways, and ways from villages are not here meant, but private ways; which may arise from grant or custom; or an impossibility of getting to a piece of ground granted, any other way.



5. A right to exercise any public or private office, and to take the fees, is a fifth species of incorporeal hereditaments. A person may have an estate in such office, or a term of years. But it is enacted by statute, that no public office of trust shall be sold, on pain of disability to dispose of it or hold it.

6. Dignities are a sixth species, but of these we have treated.

7. Franchises are a seventh. These are royal privileges, branches of the King's prerogative, granted to the subject by the crown. And they are in their kinds almost infinite: the same identical privilege, however, granted to one, cannot be granted to another.

To be a county palatine is a franchise; to be incorporated is another. Court-leets, manors, lordships, to have waifs, wrecks, &c. to have a court of one's own, and a liberty of trying causes; to have a fair or market; with the right of taking toll there, or at other places, as at bridges, wharfs; to have a forest, chase, park, warren, fishery: these are all franchises.

In the hands of a subject, a *forest* is no more than a chase, not being subject to the forest laws. A *chase*, however, differs from a park, it not being inclosed; for a man may have a chase in another man's ground as well as his own, whereas a *park* implies only an enclosure extending over a man's own land. To constitute, however, a legal park, it is necessary to have the King's grant, or, that it should have been a park, time immemorial. The difference, however, between a real park and enclosed grounds is now not very material, only that any man killing beasts in a real park or chase, such as a deer, fox, hares, wolf, &c. except it be those who possess those franchises of forest, chase, or park, is liable to be punished at Common Law. *Free-warren* is also a franchise contrived to preserve hares, rabbits, partridges, quails, rails, woodcocks, pheasants, mallards, and herons; which, being *feræ naturæ*, every one otherwise would have a right to kill: but since the new statutes for preserving game, this franchise is disregarded, the name being now only kept up in grounds appropriated for breeding hares and rabbits. An exclusive right of *fishing* in a public river is also a royal franchise, and is as old as the reign of Henry II.

8. Pensions or a right of sustenance are an eighth species of incorporeal hereditaments. These in the law are called *corodies*; and were formerly



formerly certain allotments of provision, now paid in money or pension, especially when due from ecclesiastics. (See page 46.)

9. Annuities are a ninth species, and differ only from *corodies* as arising from lay persons: being a yearly sum chargeable upon the person of the grantor, and which the grantor is answerable for as long as he lives; no act of bankruptcy or insolvency being able to discharge him.

10. Rents are the last species of incorporeal hereditaments, being certain profits annually issuing out of lands and tenements corporeal.

Of rents there are three kinds, *rent-service*, *rent-charge*, and *rent-seck*. *Rent-service* has some corporal service incident to it; as where a tenant holds his lands by paying a certain small rent, and by the service of ploughing his lord's lands; the small rent in this case is called *Rent-service*. A *rent-charge*, is where a man makes over the fee-simple of an estate, reserving only to himself a certain rent payable therefrom, for the arrears of which he can at any time distrain the said estate. *Rent-seck* or barren-rent, is a rent reserved by deed without any clause of distress: the distinctions however between these rents, with respect to the mode of recovery, is now abolished, for persons claiming them may distrain for either.

If no particular place be named in the reservation, all rent is payable upon the land from whence it issues, except rents to the King, which must be paid at the Exchequer or to his country receiver: and rent is demandable and payable, before sun-set of the day it is made payable on.

## CHAP. II.

### OF TENURES.

ALMOST all the real property of this kingdom is, by our laws, supposed to be granted, dependent upon and holden of some superior lord, by and in consideration of certain services, to be rendered to the lord by the tenant or possessor of this property. The land holden is called a *tenement*, the holder a *tenant*, and the manner of holding, a *tenure*. Thus all the land in the kingdom is supposed to be holden, mediately or immediately of the King. If the King grants a manor.



a manor to A, and he grants a portion of it to B; B is said to hold his lands immediately of A, and mediately of the King; but A is the immediate tenant of the King, for allodial property, in the hands of subjects, that is, property held of no superior at all, is unknown to the law of England.

The free lands of this kingdom, till the year 1660, were held by two grand species of tenure, *military tenure*, or that by knight-service, and *free-focage*; but as the first at the Restoration was abolished and sunk into the latter, we shall find it necessary only to speak of focage, which is a tenure by any certain and determinate service: as to hold lands by fealty, and twenty shillings rent; or by homage, fealty, and twenty shillings rent; or by homage and fealty without rent; or by fealty and certain personal services, such as ploughing the lord's land for three days; or by fealty only. All these are tenures in focage, which, in its original signification, implies free tenure.

There is indeed a kind of tenure still subsisting among us, called *Copyhold*, or tenure by copy of court-roll at the will of the lord, which sprung from the antient tenure of *pure villenage*, whereby the holder was bound to do whatsoever his lord commanded him. This tenure leads us to say something of manors.

Manors are as antient as the Saxon constitution, though differing a little from those that now exist. A manor was formerly a barony, and consisted of a certain district of land, the usual residence of the owner, kept in his hands for the use of his family; the rest was distributed among his tenants, under two different modes of tenure. Some were held by deed under certain rents and free services, and some without any writings, were allotted to the common people at the will of the lord, and resumed at his discretion; the residue, being uncultivated, was called the lord's waste, and served for public roads, and for common pasture to the lord and his tenants. Each lord of a manor is empowered to hold a court-baron for redressing misdemeanors and nuisances within his manor, and for settling disputes of property among his tenants. And this court is so essential a part of every manor, that if not attended by two tenants the manor is lost.

Such of the King's greater barons as held a large extent of territory under the crown, frequently granted out smaller manors to be held under them. Such extent of territory, comprizing fundry manors, is called an *Honour*, and the lord is called *Lord paramount*.



These lands that were held by deed under certain rents and fee-services, differed nothing from free-focage lands; but those that were allotted to the common people at the pleasure of the lord, were, like estates, held formerly in villenage, whereby the holder was bound, as was said before, to do whatsoever his lord commanded him. Certain indulgencies of lords, certain constructions of the law, and certain incroachments of the tenants, have, however, since altered the nature of this tenure, and though such tenants are still to hold their estates at the will of the lord, yet it is such a will as is agreeable to the custom of the manor; which customs are preserved by the rolls of courts-baron, or the constant usage of the manors. And those tenants who have nothing to shew for their estates but admissions in pursuance of these customs, witnessed by copies of entries in their possession, made by the stewards of court-baron, are called *Tenants by copy of court-roll*, and their estate is thence called a *Copyhold*. Their services are now usually commuted for a small pecuniary quit-rent.

In consequence of what has been premised, we may collect the two following bases on which the title of copyhold stands. 1. That the lands must be part of and situate within the manor, under which the estate is held; and, 2. That they have, time out of mind, been demised or demisable by copy of court-roll. Independent of these circumstances, no copyhold estate can exist.

When indeed it has been the custom of the manor to suffer the heir to succeed his ancestor, the estates are called *Copyhold of inheritance*. In others, where the lords have been more tenacious of their rights, they remain *copyholds for life* only.

The appendages of a copyhold tenure, besides those in common with free tenures, are fealty, services, reliefs, and escheats. Reliefs and escheats belong only to copyholds of inheritance; fealty and services to those for life only. But copyholds have also heriots, wardships, and fines. Heriots are a tribute of the best beast the tenant possessed, or other moveable good (as the custom may be) to the lord, on the death of the tenant, a manifest relict of villein tenure, nor was this to be considered as a hardship, as all the tenants goods and chattels were in fact the property of the lord, and he might have seized the same at any time, even during the tenant's life. Heriots are incident to both species of copyhold; wardship and fines only to those of inheritance.



tance. With respect to wardship, the lord is the legal guardian, and he usually assigns some relation of the minor tenant to act for him. Of fines, some are due on the death of each tenant; and others are mere fines paid for alienation of lands. In some manors, only one of these sorts can be demanded, in some both, and in others, neither. Sometimes they are fixed by custom, and sometimes are arbitrary, at the will of the lord; but even when arbitrary, the courts of law have tied them down to be *reasonable*. In short, no fine can now be demanded (unless in particular circumstances) of more than two years improved value of the estate: so studious is the law of this country to remove every, the least, badge of slavery.

There are also two other kinds of tenure, the one an exalted species of copyhold, whereby the estate cannot be transferred, but must be surrendered to the lord or his steward, to be again granted out and held; a tenure subsisting at this day: the other whereby a religious corporation holdeth lands of the donor to them and their successors for ever. The service they were bound to render for such lands was generally to pray for the souls of the donor and his heirs, dead or alive: a tenure by which almost all the religious houses held their lands, and by which the parochial clergy and many ecclesiastical and eleemosynary foundations hold them at present. But, though such service be neglected, as the law now gives no remedy to the lord of whom the lands are holden, except that of complaint to the ordinary or visitor to correct it, the tenure is fallen into disuse.

The next object of enquiry is the nature of freehold estates, which may be divided into those *of inheritance* and those *not of inheritance*.

I. Freeholds of inheritance are again divisible into two; *absolute* and *limited*.

1. The possessor of an *absolute* inheritance, or (as he is frequently styled) the tenant in fee-simple, is he that holds lands, tenements, and hereditaments to him and his heirs for ever. This is property in its highest degree, the owner of which is said to be seised thereof absolutely in his own demesne.

The fee-simple or inheritance of lands and tenements resides generally in some person or other, though many inferior estates may be made from it. As where a person possessing an estate grants a lease for a certain number of years, or for one or more lives, the fee-simple still remains vested in him and his heirs, and after the determination



mination of those years or lives, reverts to the grantor or his heirs again.

To make a fee-simple or inheritance; in the grant or donation, it is necessary to insert the word *heirs*; for if land be given to a man for ever, or to him and his assigns for ever, this vests in him only an estate for life. But this does not extend to devises by will, where the words *for ever* are sufficient; nor to fines and recoveries, considered as a species of conveyance; nor in creations of nobility by *writ*, where heirs are implied; nor in grants of lands to sole corporations and their successors, the word successors supplying the place of heirs; nor, lastly, in the case of the King, where a fee-simple will vest in him, by virtue of his prerogative, without either the words *heirs* or *successors* in the grant; but the general rule is, that the word *heirs* is necessary to create an estate of inheritance.

2. *Limited* inheritance is such as is clogged with conditions of any kind. As, in the case of a grant to *A* and his heirs, *tenants of a certain manor*, whenever the heirs of *A* cease to be tenants of that manor, the grant is lost. So also in the case of a grant to *A* and the heirs of *his body*, whereby his lineal descendants only are admitted, his collateral heirs excluded; or to the heirs *male of his body*, excluding both collaterals, and also females lineally descended.

Now all corporeal hereditaments whatsoever, and also all incorporeal hereditaments, issuing out of corporeal ones, or which concern, or are annexed to, or may be exercised within, the same, as rents, estovers, commons, and the like, may be entailed. So may offices and dignities which concern lands or have relation to fixed and certain places; but mere personal chattels, offices which relate to such chattels, and annuities which charge only the person of the grantor, not his lands, cannot be entailed. But in these last, if granted to a man and the heirs of his body, the man, as soon as he has issue born may, by alienating the estate and repurchasing it, bar such estate from ever falling to the grantor or his heirs again, though there be no issue of the grantee or such man living. An estate to a man and his heirs, for the life of another, cannot be entailed; neither can a copyhold, as this would restrain the will of the lord: but by the *special custom* of some manors, a copyhold may be limited to the heirs of the body, the custom in such case interpreting the lord's will.



Estates-tail, or such as can be entailed, are either *general* or *special*. Tail-general is where lands are given to one and the *heirs of his body*; Tail-special is where the gift is restrained to certain heirs, and does not go to all of them in general, as where lands are given to a man and the *heirs of his body on Mary his now wife to be begotten*; in which case none can inherit but the heirs of him and his wife Mary so specified.

There are certain incidents annexed to an entailed estate, but these will be explained hereafter. I shall mention only one or two for the present: 1st, A tenant in tail, that is, a man to whom and to the heirs of his body any estate is given, may, on the birth of his first child, alienate such estate by fine, by recovery, or by certain other means, and thereby defeat the interest of his own issue, though unborn, as also of the grantor or his heirs in reversion, as was before observed respecting personal chattels; except indeed in cases where the crown has the reversion. 2dly, He is liable to forfeit them for high treason: and, 3dly, He may charge them with reasonable leases, and also with his debts.

II. Next for freeholds not of inheritance, but for life only; and of these also there are two kinds, the one created so by the acts of the parties, the other by construction and operation of law.

1st. Freeholds for life, expressly created by deed or grant, are, where a lease is granted to a man to hold for his own life, for that of any other person, or for more lives than one; in all which cases he is styled a tenant for life. An estate, simply granted to *A*, makes *A* a tenant for life; and a grant for a term of life, generally without any particular person's life specified, is construed an estate for the life of the person to whom it is granted; all grants in law being construed most strongly against the grantor, unless such grantor be the King.

But in estates granted for life, with certain contingencies, they may expire before the death of the person to whom the grant was made; as an estate granted to a woman during her widowhood, or to a man till he be promoted; in which cases, the estate will expire on the marriage of the woman, or the promotion of the man. And yet while they subsist, they are termed estates for life. An estate also for life, may end by a man's *civil* death; as if the possessor of such estate should take up a monastic life, which renders him dead in law. It is on this account, that in conveyances the grant is generally  
made



made "for the term of a man's *natural* life," which can only end by his *natural* death.

The emoluments of a life estate, whether it be created by deed, or by construction of law, are principally the following ;

1. Every tenant for life, unless restrained by agreement, may cut wood for firing, and implements of husbandry, but he may not fell timber, or do other waste upon the premises.

2. Neither he nor his representatives shall be prejudiced by any sudden determination of his estate. Thus, if a tenant for life sows his land and dies before harvest, his executors shall have the crop. So, if a lease be made to husband and wife during coverture, or the time they continue so, and the husband sows the land, and a divorce takes place before the harvest, the husband shall have the crop. In like manner, by 28 Hen. VIII. c. 11. all persons presented to any ecclesiastical benefice, or to any civil office, are considered as tenants for their own lives, unless the contrary be expressed in the form of donation.

3. A third emolument relates to lessees ; for they have not only the same but greater indulgencies than their lessors, the original tenants for life ; for in cases where a tenant for life shall not have the profits of his labour, owing to the estates expiring from some act of his own ; this exception shall not reach his lessee or under-tenant, who is a third person. As where a woman holds an estate during her widowhood ; if she marries, she loses the estate ; but this act shall not deprive her tenant of his crop, when such tenant has sown the land, he not being able to prevent her marriage.

2dly. A freehold for life, happening by operation of law, is of three kinds : *viz.* 1. That of tenant in tail after possibility of issue extinct. 2. That of tenant by the curtesy of England ; and, 3. That of tenant in dower.

1. A tenant in tail after a possibility of issue extinct is, where a person, to whom, and to whose heirs by his present wife, (suppose Mary) an estate is granted, should, losing his wife, and having no children living by her, become tenant for life, to that estate ; for in this case the estate cannot descend to any one. Such an estate must be created by the act of God, arising from the death of that woman out of whose body the issue was to spring. A person enjoying an estate in this manner, is not punishable for waste, &c. Indeed the law considers  
this



this estate as equivalent to an estate for life only, and, as such, will permit this tenant to exchange his estate with a tenant for life; but deems the estate forfeited, if he alienates it in fee-simple.

2. A tenant by the curtesy of England, is a man who marries a woman seised or possessed of an estate of inheritance, who has by her, issue born alive, and capable of inheriting her estate. In this case he shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England. But there are four requisites necessary to make this claim of the man's good. 1. The marriage must be legal. 2. The wife must have been in actual possession of the estate; it is not sufficient to have had it in reversion: except in the case of some incorporeal hereditaments; such as the advowson of a church which did not become vacant during the wife's life. If the wife be an idiot she is not supposed to have her estate in possession, the King taking it by virtue of his prerogative, as soon as she has any title to it; of course, her husband cannot be tenant of it by curtesy. 3. The issue must be born alive, and during the life of the mother. Indeed in gavelkind lands, the husband may be tenant by the curtesy without having any issue. But in general there must be issue born, and such as was entitled to inherit had it lived. 4. The last requisite is the death of the wife, before which the husband has not a complete claim to the estate, though he may before do many acts to charge the lands.

3. Tenant in dower, is where the wife shall have, for her natural life, a third part of all the lands and tenements which her husband possessed during the coverture.

In order to be endowed, or to have her thirds, she must be the wife of the party at the time of his death. If she be divorced *a vinculo matrimonii*, she cannot have her dower, but a divorce *mensa et thoro* only does not destroy it. Yet now, by 13 Edw. I. c. 34. if a woman elopes from her husband and lives with an adulterer, she loses her dower, unless her husband be voluntarily reconciled to her. Widows of traitors, but not the widows of felons, are by statute also barr'd of their dower (except in the case of some modern treasons respecting the coin). Neither can an alien be endowed, (the Queen Consort excepted) nor shall a wife be entitled to her dower, if she is not more than nine years old at her husband's death.

A widow



A widow by law now is entitled to a third part of all lands and tenements of which her husband was seised in fee-simple or fee-tail at any time during the coverture; that is, of every thing he possessed, estate or effects, and of all reversions to which he was entitled; in short, of any thing, of which any child she might have had, might possibly have been heir. For example, if a man possessing an estate hath a son by a first wife, and after marries a second, such second wife, when a widow, shall have a third part of such estate, as on the death of the son by the former wife, her issue might possibly have been heir to it. But if the husband held only his estate to him and his heirs by his wife Mary, though Mary might have been endowed, or have had her third part of this estate, yet if Mary dies, and he marries again, his second wife shall not enjoy the same privilege, as no issue she could have had by him, could by any possibility inherit them. In cases where the husband is possessed only of lands *in transitu* (as where, by a fine, land is granted to a man, and he immediately renders it back by the same fine) such a possession will not entitle his widow to a third part of it; but it is otherwise, if the possession continues with him for a single moment. In a word, a widow is entitled to a third part of all her husband's lands, tenements, and hereditaments, corporeal and incorporeal, under the restrictions above set forth, unless there be some special reason to the contrary. Nay, if a man alienates his land during the life of his wife, and she not divorced, when a widow, she is entitled to the thirds of such alienated lands, for he parts with them liable to dower. Copyholds are not liable to dower, being estates only at the will of the lord, unless it be by the special custom of a manor, in which case such dower is called the widow's free-bench.

A widow by statute is entitled to live in her husband's chief mansion house, for forty days after his death, in the course of which forty days her dower shall be assigned her, either by the heir of the husband or his guardian. If this be not done, or done unfairly, she has her remedy at law, and the sheriff is appointed to assign. If more be assigned her than she ought to have, it may be afterwards remedied by a writ of *admeasurement* of dower. If the matter, of which she is endowed, can be divided, it must be set out by measure and bounds, if not, she is to be endowed specially; as of the third presentation to a living, the third part of the profits of an office, the third sheaf of tithe, and the like. Let us next see what will bar a widow's claim to dower.



And this may happen not only by elopement, divorce, by being an alien, by the treason of her husband, and other disabilities before mentioned; but she may be barred of her dower, by detaining the title deeds or evidence of the estate from the heir, untill she restores them: and by a statute of Edw. I. if a widow aliens the land assigned her for dower, it is immediately forfeited to the heir. She may also be barred of her dower by levying a fine or suffering a recovery of the lands, during her coverture. But the general method of barring dowers is by jointure.

A jointure is a joint estate, strictly speaking, limited to both husband and wife, or a sole estate limited to the wife after the death of the husband, which being made to her before marriage, precludes her, by 27 Hen.VIII. c. 10. for ever from her dower. But then these four requisites must be punctually attended to. 1. The jointure must take place immediately on the husband's death. 2. It must not be for a shorter term than her own life. 3. It must be made to herself alone, and not in trust; and, 4. It must be particularly expressed in the deed of conveyance, that such jointure is in satisfaction of her *whole* dower. If the jointure be made after marriage, she can chuse, after the death of her husband, whether she will accept the jointure or her dower. And if by any fraud or accident, the jointure proves to be on a bad title, and the widow is turned out of possession, she may claim her dower as at Common Law.

Tenants in dower have some privileges superior to jointresses, and jointresses have others superior to tenants in dower. Tenants in dower, by Common Law, are not liable to pay tolls or taxes, nor can the King distrain for any debt her husband might have contracted with him during the coverture. On the other hand, a widow may enter on her jointure land, at once, without any formal process, whereas to compel a legal assignment of dower, has a very tedious mode of proceeding, and is attended with great trouble. And a still greater advantage to a jointure is, that it is not forfeited by any treason of the husband, which is not the case with dower; of course, of the two provisions, that of a jointure is the most eligible.

We will next consider estates, in themselves less than freehold: of which there are three kinds. 1. Estates for years. 2. Estates at will; and, 3. Estates by sufferance.

I. An



I. An estate for years is a lease or agreement for the possession of lands or tenements for a certain length of time. If one man make a lease to another, for so many years as A B shall specify, it is valid. If no day of commencement is named in the lease, it begins from the sealing and delivery of it. But a lease granted for so many years as A B shall live, is void from the first, as the term can never be reduced to a certainty. In like manner, no rector can grant a lease of his glebe for so many years as he shall continue rector; but a lease for a certain number of years, provided A B shall so long live, or so long continue rector, is a good lease, there being here a certain fixed period, beyond which it cannot continue, though it may determine sooner.

And with respect to the period of a year, the law considers it only as three hundred and sixty-five days: for though in leap year it consists of three hundred and sixty-six, yet by 21 Hen. III. the last two days are considered only as one. In calculating months; some are styled lunar, and others calendar; the lunar month is twenty-eight days; and all months in law, imply lunar months, unless otherwise expressed. A lease therefore for twelve months, is only for forty-eight weeks; but if it be made for *a* twelvemonth, it is good for the whole year. In the space of a day, the whole twenty-four hours are reckoned; if therefore I engage to pay money on any certain day, I discharge the obligation, provided I do it before twelve o'clock at night.

It must be observed here, that, as an estate even for a thousand years is only a personal estate, whereas an estate for any life is a freehold; so a lease for years may be granted to commence at some future period, though a lease for life cannot: for there is no freehold estate without corporal possession, which cannot exist, if it is to take place only at some future period. A bare lease does not vest any estate in the lessee, but gives him a right only of entry on the premises, which right is called his *interest in the term*; but when he has absolutely entered and accepted the grant thereby, he becomes then *possessed* of the *term* of years, though not properly of the land: for the word *term* does not merely imply the time named in the lease, but the estate also, and the interest that passes by that lease: for the *term* may expire by surrender, forfeiture, &c. even during the continuance of the *time*. Thus, if I grant a lease to A for the *term* of three years, and after the expiration of the said *term* to B for six years, and A surrenders,

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renders, or forfeits his lease at the end of *one* year, B's interest shall take place immediately; but, if the lease had been thus worded, "from" "and after the expiration of the said *three years*," or "from and after" "the expiration of the said *time*" (omitting the word *term*) B's interest would not commence till the three years were fully elapsed, whatever might have become of A's term.

A tenant for a *term* of years, has, unless by special agreement to the contrary, a title to the same estovers, that a tenant for life is entitled to, that is to say, to house-bote, fire-bote, plough-bote, &c. expressions which have been before explained.

As to the profits of that land sowed by a tenant for years, in the last year of his time or term, there is this difference between him and a tenant for life: that, whereas in a lease for life, the time is uncertain, and of course the tenant shall be entitled to the crop at harvest, though the lease expires between seed-time and harvest, yet it shall not be so in a lease for years, where there is no such uncertainty; for should the lease expire at Midsummer, if the tenant is simple enough to sow the land that spring, the crop shall be the landlord's; but should the lease expire with the life of the lessor, or any other life, the tenant is entitled to the crop; yet not so, if he forfeits his lease by any act of his own.

II. An estate at will is a lease of land granted during the pleasure of the lessor. Such an estate is not assignable, because the lessor may remove the lessee when he pleases; but the lessee may quit the land at any time. Indeed, if the lessor should remove him between seed-time and harvest, the lessee is entitled to the crop, but not so, if he removes himself: and it is now settled in our courts of law that, beside, an express declaration of the lessor made upon the land, or by notice given to the lessee that he shall hold no longer, the following circumstances shall put an end to an estate at will: *viz.* the exertion of any act of ownership by the lessor, such as entering on the premises, and cutting timber, distraining for rent, and impounding such distress on the land; granting a lease of the land for years, to commence immediately; any act of desertion by the lessee, such as assigning the estate to another, or committing waste, or, above all, the death or outlawry of either lessor or lessee. In cases where the tenant is suddenly removed, he shall have reasonable liberty to take away his property; and if the rent be payable quarterly or half-yearly, and the tenant should chuse to quit, the rent shall be paid to the end of the

current



current quarter or half year. In short, the law is careful that no sudden determination of one party shall extend to the unforeseen prejudice of the other: it is for this reason that tenancies at will have of late years rather been considered as tenancies from year to year, courts of law not suffering either party to determine the tenancy even at the end of the year, without reasonable notice to the other.

III. An estate at sufferance is where a man becomes possessed of land by a legal title, but holds it afterwards without any title at all. As where a tenant holds a farm without leave of his landlord, beyond the time of his lease; or where a tenant at will keeps possession after the death of the landlord. Such a man is a tenant at sufferance, and may be ousted by formal entry of the owner upon the premises, and the legal process of ejectment, but cannot be sued upon an action of trespass. Indeed where the land belongs to the crown, such a holder over is considered as an absolute intruder, and may be prosecuted accordingly; but 4 Geo. II. c. 28. & 11 Geo. II. c. 19. have almost put an end to the practice of tenancy by sufferance, unless with the tacit consent of the owner: for by these it is enacted, that in case any tenant for life or years, or other person claiming under or by collusion with such tenant, shall wilfully hold over after the determination of the term, and demand made, and notice in writing given, by him to whom the remainder or reversion of the premises shall belong, for delivering the possession thereof; such person so holding over, or keeping the other out of possession, shall pay for the time he detains the land, at the rate of double its yearly value. And, in case any tenant, having power to determine his lease, shall give notice of his intention to quit the premises, and shall not deliver up the possession at the time contained in such notice, he shall thenceforth pay double the former rent, for such time as he continues in possession.

Besides the several species of estates we have mentioned, there is still another called a *Conditional* estate or an estate *upon condition*; being such whose existence depends on the occurrence or non-occurrence of some uncertain event: and of this there are two kinds. 1. Estates upon condition *implied*; and, 2. Estates upon condition *expressed*.

I. Estates upon condition implied in law are, such as are granted with conditions inseparably annexed to them, from their very essence and constitution, though no condition be expressed in words: as, for example, the grant of an office, which implies a condition, that the



grantee, or person to whom such office is granted, shall fulfil the duties of it; (though such condition is not expressly set forth in words) if not, it shall be lawful for the grantor or his heirs to turn him out, and grant the office to some other person; for an office, either public or private, may be forfeited by abuse or neglect. Franchises also are held to be forfeited in the same manner.

On the same principle proceed all the forfeitures, deemed in law, of life estates and others, for any acts done by the tenant himself, that are incompatible with the estate he holds; as if he should make over such estate as a fee-simple, this being by the Common Law such a breach of the condition annexed to a life estate, as incurs a forfeiture of it, which condition is, that estate-holders shall not attempt to create a greater estate than they themselves are entitled to.

II. An estate on condition expressed in the grant itself, is where any species of estate is granted, with an express condition annexed, whereby the estate shall either commence, be enlarged or defeated on a performance or breach of such condition. Thus, if an estate for life be limited to A, upon his marriage with B, the marriage is the condition, and till that happens, no estate is vested in A. On the same principle are all estates granted during widowhood, &c.

When the conditions of such estates, either implied or expressed, are fulfilled, the grantee or holder may have an estate of freehold, provided the estate on which such condition is annexed be in itself of a freehold nature. If the express condition of an estate be *impossible* at the time it was created, or becomes afterwards so by the act of God, or the act of the party granting such estate, or if it be *contrary to law* or *repugnant* to the nature of the estate, it is void: in any of which cases, if the condition is *subsequent*, that is, to be performed *after* the estate is vested, the estate shall become absolute in the tenant; but, if *precedent*, that is, to be performed *before* the estate is vested, the grantee can have no claim upon it. For example, if a fee-simple be granted to a man on a *subsequent* condition, that unless he travels from London to York in five hours, within a certain period, or marries a certain woman by such a day, (within which time the woman dies, or the grantor marries her himself) or unless he kills another, the estate shall be vacated and determine; here the condition is void, and the estate becomes absolutely the property of the grantee: for the estate once vested in him shall not be defeated afterwards by an impossible



possible or illegal condition. But, if the condition be *precedent*, that is, to be performed *before* the estate is vested, as a grant to a man that provided he kills another, or travels to York in five days, he shall have such an estate, the grantee can have no claim, for he hath no estate till the condition be complied with.

There are some estates defeasible upon condition subsequent, that require a particular notice: such are

Estates held in pledge; which are of two kinds, living pledge, and dead pledge or mortgage.

Living pledge is where a man borrows a sum of money, and grants the lender an estate to hold, till the rents and profits of that estate shall repay the money borrowed. Such an estate is conditioned to be void as soon as the money is repaid; and here the land in pledge is said to be living, as it subsists and survives the debt: but a dead pledge or mortgage, is when a man borrows of another a certain sum, and grants him an estate, on condition, that if he, the mortgagor, shall repay the mortgagee the sum borrowed on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in pledge; or, as is now the custom, the mortgagee shall re-convey the estate to the mortgagor. Here the land pledged is, by law, in case of non-payment at the time specified, dead and lost to the mortgagor, and becomes absolutely vested in the mortgagee. But lest such mortgaged estate should be liable to the dower of the widow of the mortgagee, the present mode of mortgaging is only to grant a long term of years, by way of mortgage, with condition to be void on repayment of the money borrowed.

Though from the nature of mortgages, the mortgagee might enter upon the estate as soon as in possession of the deeds, yet the mode now is to agree that the land shall still remain in the possession of the mortgagor, till the day of payment, when, in case of failure, the mortgagee may take possession; but here again the court of Chancery interferes, and though the lands mortgaged be thus forfeited, yet it will allow the mortgagor, within a reasonable time, to redeem his estate, paying to the mortgagee his principal, interest, and expences. This privilege to mortgagors is called the *equity of redemption*. On the other hand, the mortgagee may either compel the sale of the estate, in order to get his money immediately, or he may call upon the mortgagor to redeem it within a short time, on pain of being ever *fore-closed*.



*closed* from redeeming the same. In some cases of fraudulent mortgages, the fraudulent mortgagor, by 4 and 5 Will. and Mary, c. 16. loses all equity of redemption whatever. The mortgagee is indeed now obliged to serve the mortgagor with an ejectment to get possession of the estate, but by 7 Geo. II. c. 20. after payment or tender by the mortgagor of principal, interest, and costs, the mortgagee can maintain no ejectment, but is compellable to resign his securities.

There are two other species of estates defeasible on condition subsequent, *viz.* 1. Those held by *statute merchant*, and *statute staple*, which are estates of debtors conveyed to creditors, as a security till the debts are paid; and, 2. An estate by *elegit*, a writ so called, by which the sheriff, on the plaintiff's obtaining judgment for a debt, gives him possession of one half of the defendant's lands, till his debt and costs are paid: but as these seldom occur, we shall take no further notice of them.

We have hitherto considered estates with respect to their duration only, let us now take them in another view; with regard to the time when their profits begin. In this sense, they may be said to be either in *possession* or *expectancy*.

I. All the estates we have hitherto treated of, are estates in possession, and as we have spoken fully on this head, nothing further remains: but the doctrine of estates in expectancy, is nice and abstruse; they will require therefore no small degree of attention.

II. Of expectancies there are two kinds, one created by the act of the parties, called a *Remainder*; the other, by act of law, called a *Reversion*.

1. An estate then in remainder is an estate so granted as to take place after another estate is determined or ended. As, if lands are granted to *B* for thirty years, and at the expiration of that term to *C* and his heirs for ever; in this case *B* is tenant for years, the *remainder* to *C* in fee, which is for ever. Here now are two estates made out of one; the first, in possession to *B*, the second, in expectancy to *C*. If an estate be granted to *B* for thirty years, after that term to *C* for life, and then to *D* and his heirs for ever, the law would express it thus; *B* is a tenant for years, with *remainder* to *C* for life; *remainder* over to *D* in fee. A remainder then implies some particular or preceding estate; for an estate granted or created to commence at a future period, without some intervening estate, cannot



cannot be properly a remainder. It is a maxim indeed at Common Law, that no freehold can be created to commence in future, for to create a freehold, immediate possession must be given; though a lease therefore to *A*, to commence from the end of three years next ensuing, be good, yet a conveyance of lands to *A*, to hold to him and his heirs for ever, from the end of three years next ensuing, is void. To make therefore a freehold good to *B*, the enjoyment of which is to commence at a future period, a preceding or particular estate must be first granted to *A*, and *A* be put in possession of it, which, as this particular estate and its remainder is one and the same estate, *A*'s taking possession of it naturally communicates that possession to *B*, without which possession it cannot be a freehold. Neither should such a particular estate, that supports a remainder, be a lease at will, nor be an estate for the life of a person not in being, nor an estate for life upon condition, on breach of which condition, the grantor re-enters and vacates it; for in these cases the remainder would be void, as such particular estates may become void before the expiration of the time they are granted for.

To make a remainder also a good freehold estate, the preceding or particular estate for life or for years must be given, with firm possession, out of the power of the grantor or his heirs to recover; for the reasons before assigned.

To make a remainder also good in law, the estate must vest in the person to whom it is first granted, till the instant that the person who has the remainder takes possession of it. Suppose, for example, an estate be given to *A* for his life, and the remainder to the eldest son of *B* for ever, and *A* should die before *B* has any son, the remainder would be void; for the link, if it may be so called, between *A* and the eldest son of *B*, is broken by the death of *A*, before the birth of *B*'s son: and even supposing *B* should afterwards have a son, he will not enjoy this remainder, on the principle before laid down, that as the precedent or particular estate, and the remainder are one and the same in law, the particular estate supporting the remainder; when such estate drops, the remainder drops of course; a third intervening estate between the death of *A* and the birth of *B*'s son, will not keep it up. It is on this last principle that the doctrine of *contingent* remainders depends, remainders being either vested or contingent. The

nature



nature of vested remainders we have seen, contingent remainders are now to be explained.

Contingent remainders are those where the estate in remainder is uncertain whether it may take place or not. For example, if *A* be a tenant for life, with remainder to *B*'s eldest son (then unborn), it is a contingent remainder, it being uncertain whether *B* may ever have a son. So again, if an estate be granted to *A* for life, with remainder to *B* in fee, in case *B* survives *A*; it is a contingent remainder: for during the joint lives of *A* and *B* it is contingent; if *B* dies first, it can never vest in his heirs, but is lost for ever; but should *A* die first, the remainder to *B* becomes vested. To make such contingent remainders good freeholds, the precedent or particular estate must be a freehold also; that is, where an estate is granted to *A*, the remainder in fee to the heirs of *B*, such estate must not be granted for years to *A*, but to *A* for his life; for unless the grantor gives up the freehold when the remainder is created, such freehold remainder is void; and nothing less than an estate for life is a freehold.

Contingent remainders may be destroyed, by destroying the particular estates upon which they depend, before the contingency occurs, whereby they become vested. The tenant for life of a particular estate, may, independent of his death, by surrender, alienation, or other means, destroy his own life estate, and thus defeat or destroy the remainder. In these cases therefore it is necessary to appoint trustees to preserve the contingent remainders; in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his determines. Should therefore his estate end by any other means than his death, their estate for the residue of his natural life will then take place, and support the remainder or remainders depending in contingency.

Courts of law have ever been favourable to remainders bequeathed by will; where dying persons cannot always be supposed to have practitioners at hand: but in such cases they do not call them *remainders*, but *executory devises*, or devises hereafter to be executed; for remainders, though void in a deed, shall be good by way of executory devise.

By executory devises, remainders may be created in some measure contrary to the rules before laid down. 1. In the first place, they need no preceding or particular estate to support them. 2. A fee-simple



simple or other less estate may be limited after a fee-simple; and, 3. A remainder of a chattel interest may be limited after a particular estate for life created in the same.

1. The first case happens, where land is devised to a single woman and her heirs, upon her day of marriage. Here a freehold commences in future, a contingent remainder being created, without any particular estate to support it. Till this remainder takes place, the land descends to the heir at law. This limitation in a deed would be void, but it is good by will, by way of executory devise; and not being a present interest, it cannot be barred by a recovery, suffered before it commences.

2. The second case happens where a man devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency. For example, if a man bequeaths land to *A* and his heirs, with a remainder to *B* and his heirs; if *A* dies before the age of twenty-one; this remainder, though void in a deed, is good by way of executory devise. But in both these species of executory devises, the contingencies ought to be such as may happen within a reasonable time, as within one or more lives in being, or within a term of twenty-one years.

3. By executory devise also a term of years may be given to one man for his life, and the remainder given to another, which could not be done by deed; and, in this case, it is held, provided the remainder-man, or men, be in being, during the life of the first devisee, such first devisee cannot bar the remainder by suffering a recovery.

2d. An estate in reversion is the residue of an estate left in the grantor, to commence in possession, after the expiration of some particular estate granted out by him; and is a species of estate in expectancy, created by the operation of law; a reversion being never created by deed or writing, but arising from construction of law; whereas a remainder can never be created but by deed or by testament. Both, however, are equally transferable, when actually vested. If *A* entails an estate upon *B* and his heirs; upon the extinction of *B* and his heirs, it reverts, without any special reservation, to the original grantor *A*, or his heirs; and this is called a reversion or returning of land to the grantor or his heirs, after the grant is over. The reversion also, after an estate for life, years, or will, continues in the lessor or his heirs.



To prevent any fraudulent concealments of deaths, to the injury of those who may have estates in expectancy, it is enacted by 6 Ann, c. 18. That all persons, on whose lives any lands or tenements are holden, shall (upon application to the court of Chancery and order made thereupon) once in every year, if required, be produced to the court, or its commissioners; or, upon neglect or refusal, they shall be taken to be actually dead, and the person, entitled to such expectant estate, may enter upon and hold the lands and tenements, till the party shall appear to be living.

We come next to treat of estates, with respect to the tenants who hold them. Now, estates may be held four different ways. 1. In severalty; 2. Joint-tenancy; 3. Coparcenary, and, 4. In common.

1. He that holds an estate in severalty, holds it singly, in his own right, solely: the common method of holding estates.

2. He that holds in joint-tenancy, holds the estate in conjunction with two or more persons as granted.

The nature of an estate in joint-tenancy depends on the wording of the deed or will, by which the holders claim title: for if lands be given to more persons than one, without any explanatory words, as, for example, to *A* and *B* and their heirs; *A* and *B* are immediately joint-tenants in fee, and a thorough union, with regard to the estate, takes place between them. *A* cannot say, I will have one half, and *B* shall have the other, but each has an undivided moiety of the whole. If two joint-tenants let a verbal lease of their land, reserving rent to be paid to one of them; the other has a claim to half that rent, and the land, at the expiration of the lease, reverts to both, as before. If their lessee surrenders to one, he surrenders to both, and so on; the act of one being the act of both: in actions, however, relating to their joint estate, one cannot be sued without joining the other. But if two or more joint-tenants are patrons of a living, and they present different clergymen, the bishop may refuse to admit either; because the person presented must be nominated jointly by the whole, and if they do not agree within six months, the living shall lapse. But the bishop may, if he pleases, admit either of the clerks so presented, for the good of the church, and the priest of one joint-tenant so admitted, shall preserve the title to present in both of them. One joint-tenant, however, cannot by himself do any act which may tend to injure the estate of the



the other; such as to let leases or grant copyholds; and if any waste be done, that is, if any timber be cut down, or any damage done to the land, one joint-tenant may maintain an action of waste against the other; and, by 4 Ann, c. 16. joint-tenants may have actions of account against each other, for receiving more than their due share of the profits of the joint estate.

When two or more are possessed of a joint estate, of inheritance, for their own lives, or the life of any other person; or are jointly possessed of any personal estate; on the death of either, the whole shall rest in the survivors, and in the end, in the last survivor. No one joint-tenant has a distinct moiety from the other; but, if in case of any subsequent act (as by alienation or forfeiture of either) the interest becomes separate and distinct, the joint-tenancy ceases; but, while it continues, each has a concurrent interest in the whole, and therefore, after the death of either, the whole interest devolves to the survivors.

Joint-estates or joint-tenancy cannot arise by descent or act of law, but merely by purchase, will, or acquisition by the act of the party; but they may be destroyed various ways: 1. By agreement. Now joint-tenants may agree to part their lands, in which case they are joint-tenants no longer, and the right of survivorship is destroyed. Anciently joint-tenants could not compel each other to divide; but by 31 Hen. VIII. c. 1. and 32 Hen. VIII. c. 32. joint-tenants, either of inheritances or other less estates, are compellable by writ of partition to divide their lands. 2. Joint-tenancy may also be severed by one of the parties conveying his share of the estate to a third person. In this case, joint-tenancy becomes tenancy in common. 3. If there be two joint-tenants for life, and the inheritance of the whole should become the property of one, either by purchase or descent, the joint-tenancy ceases, as their unity of interest ceases: though where an estate is originally limited to two for life and afterwards to the heirs of one of them, it shall remain in jointure during their lives. But if one of three joint-tenants should sell or part with his share, the two remaining tenants still hold their parts by joint-tenancy and survivorship; and if one of three should give up his share to either of his brother tenants, though the joint-tenancy, with regard to that part so given up, is destroyed, the two remaining shares are still held in jointure, for they still preserve their original unities. If where there are two



joint-tenants for life, one should grant away his part, for the life of his brother-tenant; his part so granted away, is immediately forfeited, it being, according to the doctrine laid down before, attempting to create a greater estate than he has; for it might possibly last longer than that which he is legally entitled to. He has it only for his own life, whereas he grants it for the life of his brother-tenant, who may possibly outlive him. If joint-tenants give up the advantage of survivorship, it is their interest to dissolve the joint-tenancy; as, in this case, each may transmit his own part to his own heirs.

3. An estate held in coparcenary, is where lands of inheritance descend to a plurality of persons; as, in default of male issue, where a man's estate descends to his daughters, in which case they all inherit and become co-heiresses, co-parceners, or parceners.

Parceners, like joint-tenants, may sue and be sued jointly, for matters relating to their joint estate, and the entry of one shall in some cases be the entry of the whole: but they cannot maintain an action of waste against each other, nor an action of trespass. If an estate descends to two daughters, where no writ of partition is brought to divide it; and one should die before the other, the surviving daughter and the heir of the other, or, when both are dead, their two heirs are still parceners, and so on, as long as it continues in a course of descent undivided: there being no right of survivorship here. If one parcener conveys away her share, though no division of the estate be made, the lands are no longer held in *coparcenary*, but *in common*.

In dividing such estates, when the partition is made by some friend, with the consent of all parties, the sisters shall chuse each of them a part according to seniority, or otherwise, if agreed; but if the eldest sister be dead, her issue shall not chuse first, but her next sister. Where an advowson descends in coparcenary, and the sisters cannot agree in the presentation; the eldest and her issue, nay, her husband or her assigns, shall present alone before the younger. In cases where the division takes place by compulsion, the sheriff assigns to each her share, as set out by the verdict of a jury impanelled on the lands: such parts as cannot be divided, *viz.* the house, right of common, &c. the eldest sister may, if she pleases, have them, making the others a reasonable satisfaction in other parts of the inheritance, or they may take the profits of the undivided thing by turns, as they take the advowson.



4. Tenants in common are those who hold a joint estate by different titles. One, for example, may hold his share by descent, and another by purchase; one may hold it in fee, the other only for life, and so on. A tenancy in common may be created by the destruction of joint-tenancy and coparcenary, as was shewn before; or may be created by express limitation in a deed; for if lands be given to two or more, and it be not joint-tenancy, it must be tenancy in common. An estate given to two, to be holden, the one half to one, and the other to the other, is in common, and where a man sells half his estate, the feller and buyer are tenants in common; for joint-tenants do not take their estate by distinct halves. But a devise by will to two persons to hold *jointly* and *severally*, is a joint-tenancy, from the word *jointly* in the bequest; whereas an estate given by will to *A* and *B*, equally to be divided between them, is a tenancy in common. But, the best way in granting an estate, either by deed or by will, if the grantor does not mean joint-tenancy, is to limit the estate to *A* and *B*, for example, as *tenants in common, not as joint-tenants*.

Tenants in common, like joint-tenants, are compellable to divide their lands, and, like them, are liable to reciprocal actions of waste, and of account. 31 Hen.VIII. c. 1. 32 Hen.VIII. c. 32. 8 & 9 W. III. c. 3.

### C H A P. III.

#### OF TITLES TO ESTATES.

**H**AVING treated of tenures and the several species of estates holden thereby, we come now to the titles by which such estates are claimed; and of these there are four degrees. We will consider them in progressive order.

I. The lowest or most imperfect degree, is mere *naked possession*, occupancy of an estate without any shadow of claim; such as occurs when one man invades the property of another, and by force or surprise turns him out of possession; which the law terms a *disseisin*, in contradistinction to that actual *seisin*, or corporal freehold of the lands which the tenant enjoyed before; or when, after the death of the landholder, and before the entry of the successor, a stranger shall contrive to get possession, and keep the right owner out. Instances have been, where



where such intruders, by negligence of the owner, and by length of time, have come at last to have a perfect indefeasible title. But the legal successor or owner may oust such an intruder by a variety of legal remedies; till some legal remedies are, however, made use of, such an actual possession, is, on the face of it, evidence of a legal title in the possessor; for without such actual possession no title can be completely good.

II. The next good title is the *right of possession*, which a man may have in himself, though not in actual possession.

III. The next is the mere *right of property*, without either possession or right of possession: for though a man at first may have been wrongfully kept out of possession, by the intrusion of a stranger; still the right of possession was in him, and had he pursued proper steps in time, he might have obtained it; but from negligence, he might let slip the opportunity, and the intruder might get such firm footing in the estate, as to leave the right owner merely a *right of property*; for should the intruder die, and leave the estate to his heir, the presumptive evidence is strongly in favour of his antagonist; the law, after so long an acquiescence, not suffering his possession to be disturbed, without enquiring into the absolute right of property.

IV. But a *complete* title is when the right of possession is joined with the right of property, and such double right united by actual seisin or possession.

Let us next see how these titles may be acquired; and this may be two ways, by *descent* and *purchase*.

I. Descent, or hereditary succession, is that claim or title whereby a man acquires his estate on the death of his ancestor, as his representative or heir at law; and the estate so descending is called his inheritance.

The doctrine of descents, is the principal object of the laws of real property in England, and is regulated by the several degrees of kindred or consanguinity. Now, consanguinity is either lineal or collateral.

Lineal consanguinity is relationship in a right line downwards, from father to son, from son to grandson, from grandson to great-grandson, and so on; or upwards from father to grandfather, from grandfather to great-grandfather, and so on.

Collateral



Collateral consanguinity, is relationship derived from the same ancestor, but not descending in a right line; for example, downwards, brother, nephew, cousin-german, second cousin, and so on; or upwards, uncle, great uncle, &c. The very being of collateral kindred depends in descending from one and the same common ancestor, whether that ancestor be a father, grandfather, great-grandfather, or at still greater distance, a portion of whose blood the descendant must have in his veins; and the nearer the common stock, the greater proportion of his blood the descendant is supposed to have; and of course the better claim or title to his possessions.

From this idea of kindred it is, that the following rules of inheritance are laid down in law.

1. Inheritances shall lineally descend to the issue of the person last actually in possession, *in infinitum*; but shall never lineally ascend.

The person next in the line of succession is either called the heir apparent, or heir presumptive; the heir apparent is he, who, if he outlives his ancestor, has an indefeasible right of inheritance, as the eldest son or his issue; the heir presumptive is he, who, if his ancestor should die immediately, would be his heir, as a brother or nephew; but whose presumptive succession might be destroyed by the birth of a child. For example, if my elder brother has no son, my eldest son will enjoy his grandfather's title or estate; but should he have a son, it will cut him off. Nay, even supposing my son should inherit after the death of my father and my brother; should my brother leave his wife with child, such posthumous child, when born, shall deprive my son of the title or estate he had taken possession of. But it must be remembered that no one can inherit by virtue of his ancestor, unless such ancestor was in actual possession of the estate, either by his own entry, or by the possession of his ancestor's lessee for years, or by receiving rent from a lessee of the freehold, or unless he hath had what is equal to corporal possession, in incorporeal hereditaments, such as the receipt of rent; a presentation to a living, in the case of an advowson; and the like.

2. The male issue shall be admitted before the female.

Thus sons shall inherit before daughters; but daughters shall succeed before any collateral relations.

3. Where there are two or more males in equal degree, the eldest only shall inherit; but the females all together.

Thus,



Thus, where a man leaves two sons, John and Thomas, and two daughters, Mary and Elizabeth; John his eldest son shall inherit solely: if John dies without issue, Thomas shall solely succeed; and if Thomas dies also without issue, the daughters shall inherit together, as co-heiresses or co-parceners.

4. The lineal descendants *in infinitum* of any one deceased shall inherit as their father or ancestor would have done before them.

Thus, the child, grandchild, or great grandchild (either male or female) of the eldest son succeeds before the younger son, and so on. If there be two sisters, Mary and Elizabeth, and Mary dies, leaving four daughters, and after this the father of Mary and Elizabeth dies leaving no other children; in this case, his estate shall be divided into two parts, of which Elizabeth shall take one part, and the four daughters of Mary shall take the other, as the representatives of their mother. A similar division would take place, if an estate fell to the issue of a man's three sisters, one of which sisters left three children, one two, and the other one; for, in this case, the estate would be divided into three parts, and one-third would be the property of the three children of one sister; one-third the property of the two children of the second sister, and one-third the property of the child of the other sister. So again, if a man dies, leaving three daughters, *A*, *B*, and *C*, and *A* dies, leaving two sons; *B* leaving two daughters, and *C* leaving a daughter and a son; the eldest son of *A* shall inherit one-third of the estate in exclusion of his younger brother, the two daughters of *B*, another third as coparceners, and the son of *C*, the remaining third in exclusion of his elder sister; because the eldest son inherits before the younger, the son before the daughter, but the daughters in coparcenary; and the same right of representation, guided by the same rules of descent, prevails downwards *in infinitum*.

5. On failure of lineal issue of the person last in possession, the inheritance shall descend to the blood of the first purchaser, subject to the three preceding rules or maxims.

By the first purchaser is understood, he who first acquired the estate to his family, no matter how he came by it, so as he did not obtain it by descent; as will be more fully shown presently. And here none are admitted but the heirs of those through whom the inheritance has passed; for all others have none of the blood of the first purchaser in them. For example, should John Pearson be possessed  
of



of an estate by descent from his mother Mary Goodall, none of his father's relations (as such) shall ever succeed to this estate; and *vice versa*. If he possessed the estate by descent from his father George Pearson, none of his mother's relations (as such) shall ever succeed to it; his father's kindred having none of his mother's blood, nor his mother's kindred any share of his father's blood: and so if the estate descended from his father's father, William Pearson, no relation of his father's mother shall, for the same reason, ever be admitted to it; but those only of his father's father.

6. The collateral heir of the person last in possession must be his next collateral kinsman of the whole blood.

This is a rule only of evidence, as is the next rule, calculated to investigate who the purchasing ancestor was, which in process of time may have been forgotten. The brother and his descendants, according to this rule, exclude the uncle and his issue; a man's brother being nearer related to him in a collateral line, than his uncle. In short, on failure of issue of the person last in possession, the inheritance shall descend to the issue of his next immediate ancestor, that is, to the issue of the possessor's father, namely, his brother or sister; and on failure of issue here, to the issue of his father's next immediate ancestor, *viz.* his grandfather, that is, to his uncle or father's brother and his issue, and so on.

But this next collateral kinsman must be also of the *whole* blood; for a distant relation of the *whole* blood will exclude a nearer relation of the *half* blood.

A kinsman of the whole blood is one sprung not only from the same father or grandfather, but also from the same mother or grandmother, that is, from the same couple of ancestors or parents. Thus an uncle or aunt of the whole blood shall exclude a brother or sister of the half blood. If *A* has two sons, *B* and *C*, by different wives, *B* and *C* are only half brothers; they never therefore can inherit to each other, but the estate shall rather fall to the lord of the manor; should the father *A* however die, his estate descending to his eldest son *B*, and should *B* die without a formal entry on such estate, *C* would inherit; not as heir to his half brother *B*, but as heir to their common father or ancestor *A*, who was the person last actually seised or in possession.



This is considered by many as hard; but the law has preserved this mode of descent, as most likely to be right, when the ancestor from whom the inheritance descends is unknown. In such a case, my kinsman of the whole blood can have no ancestors, beyond the common stock, *viz.* grandfather, great-grandfather, or the like, but what are equally my ancestors also, and mine *vice versa* must be his; he therefore is very probably descended from that unknown ancestor of mine from whom the estate descended; but my kinsman of the half blood has but one half of his ancestor's, above the common stock, the same as mine, and therefore there is not the same likelihood, that he is descended from the blood of the first purchaser. This is the reason on which the determination of the law is founded, and though there may be exceptions in some cases, it is not thought proper to alter it. To go into those exceptions, to the general reader, would be tedious and unnecessary.

And as this is the mode of descent where a purchasing ancestor did once exist, but who may be forgotten; it is also the mode, where such purchasing ancestor is merely ideal. Of this kind are all estates in fee-simple at this day, which, though of modern purchase, are inheritable as if they had descended from some unknown indefinite purchaser or ancestor: any of the collateral kindred of the real modern purchaser (and not his own offspring only) may inherit them, provided they are of the whole blood.

The crown, indeed, which of all inheritances is the highest, may descend to the half blood of the preceding sovereign, so as it be the blood of the first monarch of the reigning family; Mary and Elizabeth succeeded each other, and they were only half sisters: for the royal pedigree being always sufficiently known, there is no necessity for the exercise of this rule, which is a kind of presumptive evidence called in to render the true descent probable. For the same reason, it is, that in an estate-tail, where the pedigree from the first donee or person to whom such estate was given, must be strictly proved, half blood is no bar to the descent; because when the lineage is clearly made out, there is no need of this occasional proof.

7. The last rule is, that in collateral inheritances, relations descended from male ancestors shall be preferred to those of the female, unless where the estate has, in fact, descended from a female.



Thus, kindred on the father's side are admitted *in infinitum*, before any of the mother's relations are admitted at all; and the relations of the father's father, before those of the father's mother. When an estate has notoriously descended to a man from his mother's family, no relation by his father's side can *ever* inherit it, for the reasons before assigned; because he cannot possibly be of the blood of the first purchaser: nor can any relation of his mother inherit, where the estate has descended from his father's side.

There is a very antient custom or two belonging to particular places, that infringe upon this established mode of descent, as that of *gavelkind* in Kent, and some other parts of the kingdom: and that which prevails in divers antient boroughs, and is therefore called *Borough-english*.

That of *gavelkind*, which perhaps was general till the Norman conquest, ordains that lands shall descend, not to the eldest or any one son only, but to all the sons together; and that of *Borough-english* gives the estate to the youngest son, in preference to all his elder brothers: the elder son being supposed to emigrate, and the younger, being less capable of providing for himself, remained under the care of his father, and was provided for by him; but these are mere local exceptions, of no weight in the great scale of descent.

II. The other way by which titles may be acquired, is by purchase, which, in its most extensive signification, implies possession, not only obtained by way of sale or bargain, but any way, by a man's own act or agreement; yet not by descent, from any of his relations.

Purchase here implies *perquisitio*; or, as it was antiently termed *conquisitio* or conquest, denoting any means of acquiring an estate, out of the common course of inheritance. If I *give* land freely to another, he is, in the eye of the law, a purchaser; for he obtains that land by his own agreement, that is, by consenting to the gift. If my father's estate be entailed upon me, before I am born; when I am in possession of that estate, I am deemed in law a purchaser; for I take quite another estate than the law of descents would have given me. Nay, where an ancestor bequeaths his estate to his heir at law, with any other limitations than the course of descents would direct, such heir takes by purchase: but, if a man, possessed of a freehold, leaves his whole estate to his heir at law, so that the heir takes neither a greater nor a less estate by the devise, than he would have done without



it; he is deemed to have taken it by descent, though such freehold be charged with incumbrances for the benefit of creditors and others. In short, it is no matter by what means or mode, the person possessing an estate acquires it; if it does not fall to him in the uniform mode of descent, he is considered as the purchaser, that is, he who brought the estate into the family.

Now an estate acquired by such purchase is descendible to the purchaser's blood in general, and not confined to the heirs by the father's or mother's side; but descends to the heirs general, first of the father's side, and upon failure of issue here, to the mother's side. An estate also enjoyed by purchase, will not make the heir responsible for the acts of the ancestor, as is the case in estates by descent. For, if the ancestor by any deed should bind himself and his heirs, such deed shall be only binding on the heir, so far only as he had any estate of inheritance vested in him, (or in some person in trust for him) by descent from that ancestor, sufficient to answer the charge; whether he remains in possession, or hath aliened it before an action be brought; which sufficient estate is called *assets*. If a man therefore covenants for himself and his heirs to keep my house in repair, I can then (and then only) compel his heir to repair the premises, when he has assets or estate sufficient by descent from the covenantor, to answer the purpose; for though the covenant descends to the heir, whether he inherits any estate or not, it lies dormant, and is not compulsory, till he has assets by descent.

Purchase under this signification includes the following methods of acquiring a title to estates. 1. Escheat. 2. Occupancy. 3. Prescription. 4. Forfeiture. And, 5. Alienation.

I. Escheat, though ranged by law-writers among those methods of acquiring a title to an estate by purchase, is scarcely of that kind; it is of very old original, and was one of the fruits and consequences of feudal tenure: it is that of an estate's reverting, for want of an heir, to the lord of the fee, by whom, or by those whose estate he hath, it was originally given; the doctrine of escheats being founded on this principle, that the blood of the person who last possessed the fee-simple of the estate is by some means or other utterly extinct and gone; and since none can inherit his estate, but such as are of his blood, the inheritance itself must fail. This is the case if the tenant or last holder dies without heirs; or if his blood be attainted, for an  
attainder



attainder extinguishes blood. Let us see then how hereditary blood may fail.

1. Hereditary blood is wanting, when the tenant or estate-holder dies, without any relations on the part of any of his ancestors.

2. When he leaves no relations descending from those ancestors, from whom his estate descended.

3. When he leaves no relations of the whole blood.

4. A monster without human shape, although born in wedlock, cannot be heir to any land; of course, such a birth will not entitle the husband to be tenant by the curtesy.

5. Bastards also have no inheritable blood; nor have they any legal ancestors; of course, no legal collateral kindred, nor any legal heirs, but such as claim by a lineal descent from them. A bastard therefore purchasing land and dying, seised or possessed thereof, intestate, without issue, the land shall escheat to the lord of the fee. There is one determination in law, however, favourable to bastards, which is, when a man has a bastard son, and afterwards marries the mother, and by her has a legitimate son, and then dies, and the bastard son enters upon his estate, and enjoys it uninterrupted to his death, whereby the bastard's issue becomes seised thereof; neither his legitimate son, nor any other person can claim that estate afterwards; for the law will not suffer the matter to be unravelled after the death of such bastard, but will suppose him to have been legitimate. The legitimate son, or the right heir, should have ejected him when alive.

6. Neither are aliens allowed to have any heritable blood; of course, no relations that are foreigners can inherit by descent. If an alien be made a denizen by the King's letters patent, and should then purchase an estate (which he is allowed to do) his son, born before he became a denizen, cannot inherit that estate; but a son born afterwards may, to the exclusion of his elder brother. Should such alien, however, have been naturalized by act of parliament, such eldest son might then have inherited. But it is enacted, by 11 and 12 Will. III. c. 6. That all persons, being natural-born subjects of the King, may inherit and make their titles by descent from any of their ancestors, lineal or collateral; although their father or mother, or other ancestor, by, from, through, or under whom, they derive their pedigrees, were born out of the King's allegiance; provided by 25 Geo. II. c. 39. That no right of inheritance shall accrue to any persons whatsoever, unless



unless they are in being, and capable to take as heirs at the death of the person last seised; excepting, however, in the case where lands shall descend to the daughter of an alien; which descent shall be divested in favour of an after-born brother, or the inheritance shall be divided with an after-born sister or sisters, according to the usual rule of descents by the Common Law.

7. The blood of a person attainted for treason or other felony, is so corrupted in the eye of the law, as not to be allowed any longer inheritable, of course any fee-simple the felon possessed would escheat to the lord of the fee, if the superior law of forfeiture to the King did not intervene and intercept it in its passage: in cases of treason it does for ever; in other felonies, for a year and a day only, after which it escheats to the lord. In consequence of this doctrine, all estates of inheritance escheating to the lord, the widow of the felon was liable to lose her dower, till 1 Edw. VI. c. 12. enacted, That though any person be attainted of misprision of treason, murder, or felony, yet his wife shall enjoy her dower. But where the law of forfeiture takes place, as it does in treason, she cannot be endowed; the 5th and 6th Edw. VI. c. 11. expressly enacting, That the wife of one attainted of high-treason shall not be endowed at all.

The law of escheat in the case of attainder, goes still farther; for the blood of the tenant being utterly corrupted and extinguished, he not only loses all that he hath, but is incapable of inheriting any thing for the future; for should his father die, possessed of an estate, that estate shall escheat to the lord, because the son being attainted is incapable to inherit, and there can be no other heirs during the son's life, and if he was attainted even for treason, it escheats to the lord, for no forfeiture take place to the King unless the felon had been in possession. But, in such a felony, where the statute expresses that it shall not extend to corruption of blood, here the estate of the felon shall not escheat to the lord, but the profits of it shall be forfeited to the King, while the offender lives.

Nay, the person so attainted is not only incapable of inheriting himself, but no estate can pass through him to his posterity: his sons, for example, can neither inherit his estate, nor the estate of his father, their grandfather, nor any other ancestor on his part, by virtue of any claim he might have had. Where a man is even attainted and pardoned by the King, his son can never inherit either to him or to his  
ancestors,



ancestors, through him; unless such son be born after the pardon; for the pardon makes the father a new man; but if such son, born after the pardon, be a second son, having an elder brother born before the pardon; such second son cannot inherit while his elder brother be living, but the estate shall escheat to the lord. Further, where a man hath two sons, *A* and *B*, and *A* the elder, in the life-time of his father, marries and hath issue, and then is attainted and executed, and afterwards the father dies, the estate of the father shall not even descend to *B*, for the issue of *A*, which once had a possibility to inherit, shall bar the descent to *B*, and the estate shall escheat to the lord. To prevent this hardship to guiltless children, almost every act of parliament since Hen. VIII. creating felonies, declares that they shall not extend to any corruption of blood.

In the case of a corporation, indeed, should one, by any accident, be dissolved, its estate or estates shall not revert to the lord by escheat, but to the donor or his heirs.

There is another incapacity of taking by descent, which, though not productive of escheat, ought here to be mentioned. By 11 and 12 Will. III. c. 4. every papist who shall not abjure the errors of his religion by taking the oaths to government and making the declaration against transubstantiation, within six months after he has attained the age of eighteen years, shall be incapable of inheriting or taking by descent as well as purchase any real estate whatsoever; and his next of kin being a protestant shall hold them to his own use, till such time as he complies with the terms imposed by the act; but this incapacity is personal only, does not destroy the inheritable quality of his blood, of course does not impede the descent to any of his relations. This act however of the 11 and 12 Will. III. is repealed by a statute of 18 Geo. III. so far as it disables papists from taking by descent or purchase, provided such papists shall within six months of the accruing of their title to estates, being of the age of twenty-one years, or who being under twenty-one, shall within six months of their attaining the age of twenty-one years, or being of unsound mind, or in prison, or beyond the seas, then within six months after such disability removed, take and subscribe an oath of allegiance and supremacy, as expressed in the said act.

These are the several deficiencies of inheritable blood, which, so often as they occur, occasion lands to escheat to the lord of the fee,  
the



the original proprietor or his heirs; but it must be remembered, that no estates, escheat, but entire fees-simple.

II. Occupancy is another claim to lands under the title of purchase; which is, taking possession of things which before belonged to no one, as we have seen at the beginning of Chap. I. Book II.

The right of occupancy, so far as it relates to real property or estates, our laws have confined to one single instance, *viz.* where a man has lands granted to himself only, not his heirs, for the life of another person, and dies during that life, by which he held them. In this case, he that could first enter on the estate, might lawfully retain possession during that life, by which the deceased person held it, unless the reversion of such estate was in the crown. Had such estate been granted to the man and his heirs; the heir would have enjoyed it during the life by which it was held, and would have been called a *special occupant*: to curtail, however, the claim of occupancy, it is enacted, by 29 Car. II. c. 3. That where there is no special occupant, in whom the estate may vest, the tenant for the life of another may devise it by will, or it shall go to the executors or administrators, and be assets in their hands for payment of debts; also by 14 Geo. II. c. 20. that the surplus of such estate for another man's life, after payment of debts, shall go in a course of distribution like a chattel interest. But notwithstanding these statute clauses; as, before they were enacted, no one could claim a right, by common occupancy, to incorporeal hereditaments, such as rents, tithes, or the like; because of these there could be no corporal possession had, or any entry made, and, of course, a grant of such hereditaments for the life of another determined or ended with the death of the grantee: and as these clauses cannot be construed so as to create a new estate, or keep that alive, which by Common Law was determined, it is apprehended, that such estate granted to one man for the life of another, must revert to the grantor, after the death of the grantee. When there is a residue left, the statutes give it to the executors or administrators, instead of the first occupant; but they will not *create* a residue to give it to either.

In other cases where a landholder dies intestate, and no heir or owner can be found in the common course of descent, the law gives the estate to the King, or to lord of the fee, by escheat.

If an island arises in the middle of a river, it belongs to the owner of the land on that side, to which the said island is nearest; but if an  
island



island arises in any sea belonging to the crown of England, it is the property of the King. New land on the coast, occasioned by washing up of sand and earth, or by the sea's retiring, provided such new land is acquired by small degrees, belongs to the owner of the land adjoining; but should such new land appear suddenly, it belongs to the King. Where a river, running between two lordships, by degrees gains upon one, leaving the other; the owner, losing his grounds thus gradually, has no remedy; but should the course of the river be suddenly changed, the man who thereby loses his ground shall have, as a recompence, what the river has left in another place.

III. Prescription is a third method of acquiring real property under the denomination of purchase; that of being able to shew no other title to what we claim, than that it has been in our family time immemorial: but to make this title good, by 32 Hen.VIII. c. 2. our ancestors must have possessed the right within the space of sixty years of the time that we claim it.

1. Nothing, however, but incorporeal hereditaments, such as a right of passage, common, &c. can be claimed by prescription. 2. Nor can any landholder claim under this title, but a tenant in fee; that is, no copyholder, no tenant for life, for years, or at will. If a copyholder does it, it must be under cover of his lord's estate; if a tenant for life, under cover of the tenant in fee-simple; for it would be absurd for such to prescribe, whose estates commenced within the memory of man. 3. Every prescription supposes a grant to have existed; of course, the lord of a manor cannot claim a right of raising a tax or toll upon strangers, because no grant could authorize such a claim. 4. Neither can what is to arise by matter of record be prescribed for, it must be claimed by grant, entered on record; such as the royal franchises of deodands, felon's goods, and the like. These not being forfeited, till the matter on which they arise is found by a jury, and thus made a matter of record, the forfeiture itself cannot be claimed by any inferior title. But treasure-trove, waifs, estrays, &c. may be claimed by prescription, for these arise not from any matter of record. 5. If a man claims a right in himself and those whose estate he holds, nothing is claimable by this prescription, but such things as are incident, appendant, or appurtenant to lands; for example, that he, or those whose manor he holds, held such a certain advowson as *appendant* to that manor: but if the advowson be a distinct inheritance,



not appendant, and he meant to claim it, he must do it in the name of himself and his ancestors.

Estates gained by prescription, are not, like other purchases, descendible to the heirs in general. If a man prescribes for a right of passage through any ground as a right in himself and his ancestors, it will descend only to the blood of that line of ancestors in whose name he so claims; but if he claims in right of himself, and those whose estate he holds, it will descend in the same manner as the estate descends, whether it was acquired by descent or purchase.

IV. A fourth method of acquiring real property by purchase is forfeiture. Now lands may be forfeited in various degrees, and by various means; as, 1. By crimes and misdemeanors. 2. By alienation, contrary to law. 3. By non-representation to a living, that is, by lapse. 4. By simony. 5. By non-performance of covenants. 6. By waste. 7. By breach of copyhold customs; and, 8. By bankruptcy.

1. We shall have occasion to speak more fully hereafter of forfeiture for crimes and misdemeanors; at present, I shall only mention the offences that incur a forfeiture of lands and tenements. These are, treason; felony; misprision of treason; *præmunire*; drawing a weapon on a judge or striking any one in the presence of the King's principal courts of justice; and the non-observance of certain laws enacted in restraint of Papists. See page 135.

2. They may be forfeited also by alienation, or conveying them to another contrary to law.

1st. Alienation of lands or tenements to any corporation, ecclesiastical or temporal, is contrary to law: and called alienation in *mortmain*: religious houses in this way became proprietors of estates, which were perpetually inherent in one *dead hand*. To prevent this, many statutes from time to time have been passed: but it has been held, that these statutes extend only to lands given to *superstitious* uses, and that therefore a man may bestow lands for the maintenance of a school, an hospital, or other *charitable* purposes: to prevent, however, persons on their death-beds from making large and improvident legacies, even for these good purposes, which was the design of the several mortmain laws; it is enacted by 9 Geo. II. c. 36. That no lands or tenements, or money to be laid out thereon, shall be given for or charged with any *charitable* uses whatsoever, unless, by deed indented, executed in the presence of two witnesses twelve calendar months before the death of the



the donor, and enrolled in the court of Chancery, within six months after its execution, (except stocks in the public funds, which may be transferred within six months previous to the donor's death) and unless such gift be made to take effect immediately, and be without power of revocation; and that all other gifts shall be void. The universities of Oxford and Cambridge, their colleges, and the foundations of Eton, Winchester, and Westminster are excepted out of this act; provided that no college purchase more advowsons than are equal in number to half the fellows on the respective foundations.

2dly. Alienation of lands and tenements to an alien incurs a forfeiture of the same to the crown.

3dly. Alienation by tenants of preceding or particular estates, (that is, of estates, remainders of which are granted to other persons) incurs also a forfeiture of such estates to those whose right is attacked thereby, when such tenants shall presume to convey the estates they hold in a greater manner than the law entitles them to do. For example, if a tenant for his own life, conveys away his estate, for the life of another, or in tail, or in fee, he does what he is not empowered to do; these being estates which either must or may last longer than his own life; the punishment for which is, a forfeiture of his own term in the estate to him who has the remainder, or reversion after him. The same law holds good with respect to all tenants of the mere freehold or of chattel interests; but if tenant in tail, that is, if a man, to whom and to the heirs of his body begotten, any estate be left, should, before he has any issue, convey it to another as a fee-simple, this is no immediate forfeiture to the remainder-man, that is, to the man who is to have the estate after him, provided he has no issue; but it is a mere discontinuance of the estate-tail, which the issue, if there be any, may afterwards recover; because such remainder-man's interest is very remote, depending only on the extinction of issue in tail. But, in case of such forfeitures, all legal grants by them before made, as if tenant for twenty years grants a lease for fifteen, and all charges legally made by him on the lands are good in law.

Equal both in its nature and consequences to this illegal alienation, is that crime which the law calls a *disclaimer*, where a tenant, holding lands of any lord, neglects to render him the due services, and upon an action brought to recover them, disclaims to hold of his lord. So also, if, in any court of law, a tenant for his own life, claims



any greater estate than was granted him, or takes upon himself those rights which belong to tenants of a superior class; if he asserts the reversion to be in a stranger, by accepting his fine, attorning as his tenant, that is, acknowledging himself to be his tenant; by any collusive pleading, or the like, such behaviour incurs a forfeiture of his estate.

3. Lapse is a kind of forfeiture, whereby the right of presentation to a benefice falls to the diocesan, if the patron neglects to present in time; to the archbishop of the province, if the bishop neglects; and to the King, if the archbishop neglects. That the church may not remain long unprovided, the law instituted this lapse to quicken the patron. Where there is no right of institution, there is no lapse; of course, no donative can lapse, unless it has been augmented by the Queen's bounty; nor can any living lapse, the presentation of which is originally in the crown.

Six calendar months, exclusive of the day of avoidance, is the term in which the right to present by lapse accrues from one to the other successively. Where the diocesan is patron, he shall only have one fix months to collate or fill the church in. If the bishop does not collate his own clerk immediately, and the patron should present, though after the expiration of his six months, the bishop is bound to institute the clerk whom the patron presents. If the bishop suffer the presentation to lapse to the archbishop, the patron has also the same advantage, if he present before the archbishop has filled the living; but the bishop has no such privilege in prejudice to the archbishop: but should the presentation lapse to the King, the patron loses this advantage. Lest the King, however, should keep the church void, the patron may present; but even after institution, the King, by presenting another, may turn out the patron's clerk, or, after induction, may remove him by a *quare impedit*, a writ so called.

Where a living becomes void by death, or cession through plurality of livings, the patron is bound to take notice of the avoidance at his own peril; but in case of vacancy by resignation, deprivation, or the clerk's being refused for insufficiency, the law obliges the bishop to give the patron notice, these matters being supposed to rest with the ordinary, or no lapse will take place; nor yet, if a bishop refuses or neglects to examine and admit the patron's clerk, without good reason assigned,



assigned, or notice given; nor where the right of presentation be contested, till the question of right be decided.

4. Simony is the presentation of any one to an ecclesiastical benefice for money, gift, or reward, the penalty of which is a forfeiture of the right of presentation for that turn, to the crown. It is so called from Simon Magus, who offered money for the Holy Ghost, and what adds to the crime is, that it is always attended with perjury, the person presented being sworn to have committed no simony.

By 31 Eliz. c. 6. if any patron for any corrupt consideration, by gift or promises directly or indirectly, shall present or collate any person to an ecclesiastical benefice or dignity; such presentation shall be void, and the presentee be rendered incapable of ever enjoying the same benefice: and the crown shall present to it for that turn only. But should the presentee die without being convicted of simony in his life-time, by 1 W. & M. c. 16. the simoniacal contract shall not prejudice any other innocent patron, on pretence of lapse to the crown, or otherwise: further, by 12 Ann. st. 2. c. 12. if any person for money or profit shall procure, in his own name, or the name of any other, the next presentation to any living, and shall be presented thereupon, this is declared to be a simoniacal contract, and the parties incur all the penalties of simony.

From these statutes simony is settled to be, 1. Purchasing a presentation, the living being vacant. 2. A clerk's bargaining for the next presentation, the incumbent being sick and about to die. 3. A clerk's buying, either in his own name or another's, the next presentation, and being thereupon presented to the living at some future time. But if a father purchases such a presentation for his son, it is not simony. If a simoniacal contract be made with the patron, the presentation for that turn shall devolve to the crown, but the clerk who is innocent incurs no disability or forfeiture. Bonds given to pay money to charitable uses on receiving a presentation are not simoniacal, provided the patron or his relations are not benefited thereby: neither are bonds of resignation, in case of non-residence; nor bonds to resign when the patron's son comes to canonical age; fathers being allowed to make provision for their children. 4. In short, general bonds given to resign at the patron's request are held legal; but if the party can prove the contract corrupt, such bond will be simoniacal and void. For the patron will not be suffered to make an improper use of such



such bond, such as extorting by it a composition for tithes, procuring an annuity for his relation, or demanding a resignation wantonly, or without good cause; as for example, for the benefit of his own son, or on account of non-residence, plurality of livings, or gross immorality in the incumbent.

5. The next kind of forfeitures are those by breach of condition annexed to the estate, which we have considered before, page 116.

6. The next arise from waste, which is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the injury of him that hath the remainder or reversion in fee-simple, or fee-tail.

Whatever does a lasting damage to the freehold or inheritance is waste, whether it be done voluntarily or permissively, that is, whether we pull down a house or suffer it to fall; but if it be destroyed by tempest, lightning, or the like, it is no waste. Removing wainscots, floors, or other things fixed to the freehold of a house is waste; so is reducing the number of creatures in ponds, dove-houses, warrens, &c. so that there will not be sufficient for the reversioner, when he comes to the inheritance. Cutting down timber, or topping and lopping them so as to ruin the trees, is also waste; but the tenant, unless restrained by special covenants or restrictions, may take sufficient timber for repair of the premises and farming implements. Converting land from one species to another is also waste; for example, to turn meadow or pasture land into arable, or to turn arable into wood land; so likewise to open land, unopened before, in order to search for mines. And all tenants for life or for a less term (except tenants by statute-merchant, staple, recognizance, or *elegit*, against whom the debtor may set off the damages in account) are liable to be punished for waste, unless their leases be made, *without impeachment of waste*. The punishment for waste in a guardian is single damages, and forfeiture of wardship; but other tenants shall forfeit the place wherein the waste is committed, and also treble damages to him that hath the inheritance; but if waste, however, be done only in one end of a wood, that part only shall be forfeited to the reversioner.

7. Copyholds may also be forfeited to the lord by breach of the customs of the manor; such as subtraction of suit and service; disclaiming the lord, or swearing not to be his copyholder; neglecting to be admitted tenant within a year and a day; by contumacy, in not appearing



appearing in court after three proclamations, or for refusing, when sworn, to present the truth, and in many other cases: but the forfeiture does not take place, till after the offences are presented by the jury of the lord's court-baron.

8. Another, and the last method by which lands may be forfeited, is an act of bankruptcy. When a man is declared a bankrupt, the commissioners, by 13 Eliz. c. 7. have full power to dispose of all his lands and tenements, and of all those that shall descend to him afterwards, before his debts are satisfied, and all those which were purchased by him jointly with his wife or children to his own use, or purchased with any other person upon secret trust for his own use, and divide the produce among his creditors: they have full power also to sell any lands or tenements the bankrupt might possess in estate-tail, remainder, or reversion, unless such remainder or reversioner be in the crown; and such sale shall be good against all such issues in tail, remainder-men, and reversioners, whom the bankrupt himself might have barred by any means: they have also a power to redeem any estates mortgaged, and sell them after such redemption.

V. The most customary method, however, of acquiring a title to estates is, by alienation; that is, conveyance or purchase in its limited sense, viz. by bargain or agreement, for money or otherwise; whether it be by sale, gift, marriage-settlement, or will. Let us consider then the several modes of conveyance, and who are capable of selling and buying. And,

1st. All persons in possession of estates are capable of selling and buying, unless the law has in any measure restrained them. If a man has only a right of possession, he cannot convey; he may sell, however; reversions and vested remainders, but cannot assign to a *stranger* contingencies and mere impossibilities, unless coupled with some present interest.

Persons attainted of treason, felony, and *præmunire*, are incapable of conveying from the time when the offence was committed; for the King or lord shall not thus lose the forfeiture. Though they are disabled to hold, any estate falling to them will be forfeited in consequence of their crimes. Estates also purchased by corporations will be forfeited to the lord of the fee, unless they have a licence to hold in mortmain.

Idiots,



Idiots, lunatics, infants, and persons under confinement, are in some cases incapable either to convey or purchase. Where an idiot purchases an estate, and does not afterwards, on recovering his senses, agree to the purchase (though he cannot render such purchase null, by proving himself insane at the time) yet his heir may either reject or accept the estate at his option. The King indeed may render the act of an idiot of no validity; and after his death, the next heir or person interested, may take advantage of his incapacity, and avoid any grant he may make. An infant also may refuse when he comes of age, any purchase he may make during his minority; or should he, when of age, not agree to it, his heirs may refuse it after his death. Persons likewise under confinement, may affirm or avoid such transactions, when their confinement ceases; for the law will not suffer any one to be imposed upon. Guardians or committees, however, of a lunatic are by 11 Geo. III. c. 20. impowered to renew in his right, under the directions of the court of Chancery, any lease for lives or years, and apply the profits to the use of the lunatic or his heirs.

A married woman may purchase an estate, without the consent of her husband; but if he declares his dissent, the purchase is void: but notwithstanding he may consent to it, the woman after the death of her husband may continue it or reject it; even her heirs, if she dies before her husband, and did nothing in her widowhood to declare her consent, may wave or reject it after her; but the conveyance or other contract of a married woman (except by some matter of record) is absolutely void in itself.

An alien is peculiarly circumstanced. He may purchase any thing, but can hold nothing that he purchases, except a lease of a house for merchandize; and not that, unless he be an alien-friend, that is, a foreigner with whose court we are at peace. All other purchases (when found by an inquest of office) are forfeited to the King.

Roman Catholics, above the age of eighteen, are also disabled from purchasing any lands, rents, or hereditaments; and all estates made to their use, or in trust for them, are, by 11 and 12 Will. III. c. 4. void, unless, agreeable to an act of the 18th Geo. III. they take an oath of allegiance and supremacy there enjoined. See page 135. But this statute of Will. III. is construed to extend only to papists above the age of eighteen, such only being disabled to purchase. Yet the next protestant heir of a papist under eighteen, shall have the profits during



during his life, unless he continues his errors or takes the oath within the time limited by law.

2. We will proceed next to the different modes of conveyance.

The legal evidences of translation or conveyance of property, are called *common assurances*, and are of four kinds. 1. Deed; 2. Record; 3. Custom; and, 4. Will. Of these will we treat in their order.

1. A deed is a writing sealed and delivered by the parties. If a deed be made by more parties than one, each party ought to have a copy. When the several parts or copies are interchangeably executed by the several parties, that part executed by the grantor, is called the *original*; the rest are *counterparts*; though it is usual now to make them all originals, by all the parties executing each part.

To make a deed valid, the persons contracting must be capable of doing so; the deed must be founded on good and sufficient consideration; not upon a usurious contract; nor on fraud or collusion, nor to injure just creditors: a deed or grant made, without any consideration, is construed to be effectual only to the use of the grantor. Good considerations are those of relationship, or affection; as where a man grants an estate to his kinsman: those of money, marriage, or the like. But deeds made otherwise than on valuable considerations, are often considered as voluntary acts, and set aside in favour of creditors and real purchasers. A deed must also be written or printed on paper or parchment, with proper stamps, or it cannot be given in evidence. In short, by 29 Car. II. c. 3. no lease or estate in lands, tenements, or hereditaments (except leases, not exceeding three years from the making, and wherein the reserved rent is at least two-thirds of the real value) shall be looked upon as of greater force than a lease or estate at will; unless put in writing, and signed by the party granting, or his agent lawfully authorized in writing.

A deed is good, though it has no date, or has even a false date; provided the real day of its being dated or delivered be proved. If it be not read at the request of any of the parties, it is void; and if it be read falsely, it is also void, unless such false reading be agreed upon by collusion, on purpose to make it void; in which case it shall bind only the fraudulent party. The party whose deed it is, must also, either by himself or his attorney, in order to make it good, seal, sign, and deliver it; and in order to preserve the evidence, this should be



done in the presence of witnesses, who are to attest the same at the bottom of the deed, or on the back of it.

If a deed wants any of the requisites above-mentioned, it is void in itself; but it may be afterwards made void by erasing, interlineations, or other alterations in the material part of it; by breaking off or defacing the seal; by cancelling it; by the disagreement of those whose concurrence is necessary to confirm it, as that of the husband, where a married woman is concerned; that of an infant or person under confinement, when the one comes of age, and the other is enlarged; and by the decree of a court of law.

Conveyances bear different names, according to the subject matter of the deed; *viz.* feoffment, gift, grant, lease, exchange, partition; these are original conveyances at Common Law, the rest are derivative, *viz.* release, confirmation, surrender, assignment, and defeazance, an explanation of which, and of those conveyances that have their force and operation by virtue of the *statute of uses*, would be useless to the general reader.

The doctrine of *uses* arises from estates being given to one person, for the use of another; and is of so complicated a nature as to have occasioned a variety of nice determinations and distinctions in our courts of law. All that is necessary to observe on this head here, is the nature of a trust-estate, which is considered now as equivalent to the legal ownership, governed by the same rules of property, and liable to every charge in equity, which the other is subject to in law. The trustee is considered as the instrument merely of conveyance, and can no way affect the estate, unless by selling it without notice, which, as the person for whom he holds it, is generally in possession of the land, can very rarely happen. The trust will descend, may be aliened, is liable to debts, to forfeiture, to leases, and other incumbrances, as if it was an estate at law, nay even to the curtesy of the husband. It has never indeed been yet subject to dower; nor has it been held liable to escheat to the lord, in consequence of attainder or want of heirs, because the trust could never be intended for his benefit.

Upon every grant of an estate in freehold, and in hereditaments corporeal, whether of inheritance or for life only; corporal possession must be taken of the land, or in the law phrase, livery of seisin must be made; which is one reason why freeholds cannot be made to



commence at any future period, but where a freehold remainder is created, the particular tenant for life takes possession of it for himself and the remainder-man.

This livery of seisin is either in *deed* or in *law*. That in *deed* is thus performed. The grantor, lessor, or his attorney goes to the land or the house with the grantee, lessee, or his attorney, and there, in the presence of witnesses, declares the contents of the grant or lease of which livery is to be made or possession given. If it be of land, the grantor delivers to the grantee, all other persons being off the ground, a clod or turf or a twig there growing, with words to this effect, "I deliver these to you in the name of seisin of all the lands and tenements contained in this deed;" but, if it be a house, the grantor must take the ring or latch of the door, the house being quite empty, and deliver it to the grantee in the same form; this done, the grantee is to enter the house alone, shut to the door, and then open it and let in who he pleases. Where lands are scattered up and down in the same county, livery of any parcel in the name of the whole is sufficient; but where they lie in different counties, there must be a livery in each.

Livery in *law* is not made *on* the land, but in *sight of it* only; as I give you yonder land, enter and take possession. In this case if the grantee enters and takes possession, during the life of the grantor, the livery is good, but not otherwise; unless he does not enter, for fear of bodily harm; in which case, a yearly claim made as near the land as possible will suffice.

In *leases* for years; the bare lease gives only a right to enter; an actual entry, therefore, is necessary to vest the estate in the lessee. No person by Common Law could let a lease for a greater length of time than his own interest lasted. But now, by 32 Hen. VIII. c. 28. a tenant in tail may grant leases for twenty-one years or three lives, and though he cannot bind those in remainder or reversion by such leases, he can bind his issue in tail. A husband also, seised in right of his wife, in fee-simple or fee-tail, may bind her and her heirs thereby, provided the wife joins in such lease: and all persons seised of an estate of fee-simple in right of their churches, which extends not to parsons and vicars, may (without the concurrence of any other person) bind their successors: but then the lease must be by indenture, that is, the parchment must be scrolled out at top or on the side, so



as to fit the indented scroll of the counterpart; it must begin from the day of making, and not at any greater distance of time; it must be either for twenty-one years or three lives; and not for both; it must not exceed the term of twenty-one years or three lives, but may be for a shorter term; it must be of corporeal hereditaments, such as the lessor can distrain; it must be of lands and tenements, that have been usually let for twenty years (if they have been any way let for eleven years out of the twenty it is sufficient); the customary rent also for twenty years past must be reserved yearly on such leases, and they must not be made without impeachment of waste. These guards were imposed for the security of farmers, and the consequent improvement of tillage.

But it was afterwards enacted by 1 Eliz. c. 19. for the benefit of the successor, that all grants by archbishops and bishops (including those confirmed by the dean and chapter) other than for the term of twenty-one years or three lives, from the making, or without reserving the usual rent, shall be void. Concurrent leases, if confirmed by the dean and chapter, are held to be within the exceptions of this statute, and of course valid. Subsequent statutes of the 13th, 14th, 18th, and 43d of Elizabeth extend also these restrictions to all colleges, cathedrals, and other ecclesiastical and eleemosynary corporations, and all parsons and vicars, but under the following regulations; 1. That they must not exceed twenty-one years or three lives from the making; 2. Nothing less than the usual rent must be reserved; 3. Houses in corporations and market towns may be let for 40 years; provided they be not the mansion-houses of the lessors, nor have above ten acres of ground belonging to them, and provided the lessee be bound to keep them in repair: and they may be also aliened in fee-simple for lands of equal value in recompence; 4. Where there is an old lease in being, no concurrent lease shall be made, except where the old one expires within three years; 5. No lease shall be made without impeachment of waste; 6. All bonds and covenants tending to frustrate the statutes of 13 and 18 Eliz. shall be void.

A parson however or vicar, though he cannot grant longer leases, even with the consent of patron and ordinary, than for twenty-one years or three lives, cannot make any lease at all, so as to bind his successor, without obtaining such consent. And though leases contrary to these acts are declared void, yet if the lessor be a sole corporation, they hold



hold good against him, and are also good against an aggregate corporation so long as the head of it lives; for the act was made for the benefit of the successor only, and no man can benefit by his own wrong.

There is still another restriction by 18 Eliz. c. 6. respecting college leases, enjoining that one-third of the old rent, then paid, should in future be reserved in wheat or malt, reserving a quarter of wheat for each six shillings and eight pence, and a quarter of malt for every five shillings; or that the lessees should pay for the same according to the price of wheat or malt. Thus from the plenty of money, and of course the great price of corn, the old rents are raised very considerably; it being designed that the rents should rise in proportion to other things.

Leases granted by the beneficed clergy are further restrained by several statutes of 13, 14, 18, and 43 Eliz. for, if any beneficed clergyman be absent from his cure above eighty days in any one year, he shall not only forfeit one year's profit of his benefice, to be distributed among the poor of his parish, but all leases made by him of the profits of such benefice, and all covenants and agreements of like nature, shall cease and be void; except in the case of licensed pluralists, who may let the living in which they are non-resident to their curates, provided such curates do not absent themselves above forty days in any one year.

With respect to *exchanges*; the estates to be exchanged must be of equal interest: that is, fee-simple for fee-simple; a lease of twenty years for a lease of twenty years, and the like. But no livery of seisin, even in exchange of freehold, is necessary to complete the conveyance; but entry must be made on both sides, otherwise the exchange is void. When two beneficed clergymen, with the consent of patron and ordinary, exchange their livings, and the one is presented, instituted, and inducted, and the other presented and instituted, and dies before induction, the former shall not keep his new benefice, but shall return to his old one; because the exchange was not perfected. If after an exchange, either party be thrown out of that estate he takes in exchange, through defect of the other's title, he shall return back to the possession of his own.

There are two kinds of deeds, not used to convey lands but to change them; these are bonds and recognizances.

A bond



A *bond* or obligation, is a deed whereby the obligor binds himself, his heirs, executors, and administrators to pay a certain sum of money to another at a day appointed, or to perform certain conditions under a penal sum specified.

Where the condition of a bond is, at the time of making it, impossible, or it be to do a thing contrary to some positive rule of law; or be uncertain or insensible, the condition alone is void, and the bond shall stand single, and bind the obligor for his folly to pay the money without any condition. If it be to do a thing bad in itself, the obligation is void. If the condition be possible when the bond is given, and becomes afterwards impossible by the act of God, the act of law, or the act of the obligee himself, the penalty of the bond is saved. On the forfeiture of a bond, the courts of equity interfere, and will not (let the penalty be ever so great) permit the obligee to take more (if it be for payment of money) than his principal, interest, and expences, or the damages sustained, on breach of covenants; nay, by 4 and 5 Ann, c. 16. in case of a bond, conditioned for the payment of money, the payment or tender of the principal sum due, with interest and costs, even though the bond be forfeited, and a suit commenced thereon, shall be a full satisfaction and discharge.

A *recognizance* is a bond of record, which a man enters into to do some particular act, such as to appear at the assizes, to pay a debt, &c. before a court of record or a magistrate properly authorized.

2. The next legal evidence or common assurance of a conveyance of property is matter of record; depending not on the consent of the parties themselves, but on the sanction of a court of record. These are private acts of parliament, king's grants, fines, and common recoveries.

*Private acts of parliament.* It sometimes happens, from various causes, that estates are so entangled, and circumstanced, that the owners cannot be relieved by either of the courts of law or equity. In these cases, particular acts are passed to unfetter them; but such acts are carried on with the utmost deliberation and caution, and when passed, stand upon the public records of the nation, as special *private* laws only, which no judge or jury is bound to notice, unless the same be set forth and pleaded to them.

The *King's grants* are also matter of public record; otherwise called *letters patent*. These first pass by bill, proposed by the attorney or solicitor-



solicitor-general, in consequence of a warrant from the crown, and afterwards signed by the King, and sealed with his privy seal, and sometimes by the great seal. But there are some grants which pass only through certain offices, as the Admiralty, or Treasury, in consequence of a sign manual, or the King's signature, without the confirmation of either signet, privy, or great seal.

The King's grant does not differ materially from the grant of a subject, only; 1. That a grant from the King at the suit of the grantee, shall be construed as much as possible in favour of the King, whereas that of a subject is construed as much as possible against the grantor. On this account, the King's grants are not usually ordered to be made at the suit of the grantee, but of the King's special grace; in which case they are construed more liberally. 2. The grant of a subject, is held to include many things (though not expressed) provided they be necessary for the operation of the grant; but not so with the King; for was the King to grant land to an alien, he could not hold it, the King's grant not making a denizen; for should it appear on the face of the grant, that the King was mistaken or deceived in his grant, and that of course his grant be informal and repugnant to law, or reason, it is void; and to prevent the King's being deceived, it is enacted by Hen. IV. c. 6. that no grant of his shall be good, unless express mention be made of the real value of the lands in the grantee's petition for them.

The next species of assurance of record is what is called a *fine*: the nature of which, and its effect we will consider.

A fine has the same force and effect in conveying of lands, as a grant, though without livery of seisin; the acknowledgment of it in a court of record being deemed of equal notoriety, which livery of seisin was calculated to establish. It is in fact an amicable agreement of an actual or fictitious suit or action, by leave of the King or his justices, and is called a *fine* because it puts an end to the contest. The manner of levying a fine is thus regulated by 18 Edw. I.

The party, to whom the land is to be conveyed, commences an action or suit at law against the other, to oblige him to convey, agreeable to a supposed agreement between them. The defendant knowing himself in the wrong, is then supposed to make overtures of peace to the plaintiff, who accepting them, applies to the court for have



leave to make the matter up, which is readily granted. The defendant then makes an open acknowledgment in court, that the lands in question are the property of the plaintiff, who by this acknowledgment levies what is called the fine or end; which is immediately recorded.

The effect of a fine is that of a solemn conveyance of lands from one to another, and cuts off all entail; for the 32 Hen. VIII. c. 36. declares, that a fine levied by any person of full age, to whom or to whose ancestors lands have been entailed, shall be a perpetual bar to them, and their heirs claiming by force of such entail: unless the fine be levied by a woman after the death of her husband, of lands which were, by the gift of him or his ancestors, assigned to her in tail for her jointure, or unless it be of lands entailed by act of parliament or letters patent, and whereof the reversion belongs to the crown. Persons interested have five years allowed them to make any claim against a fine, from the time that their right accrues; and if not done in the five years, they are barred for ever.

A further species of common assurance by matter of record is, *common recovery*: the nature and effect of which are as follow:

A common recovery, like a fine, is a suit or action, actual or fictitious, by which lands are recovered from the tenant or possessor of a freehold; which recovery being a supposed adjudication of the right, binds all persons, and vests an absolute fee-simple in the recoveror. A recovery is, in short, not compromised like a fine, but carried on through every stage of proceeding; till a judgment is obtained by the recoveror, through default of the defendant: in short, our courts of justice consider a common recovery in no other light, than as a formal mode of conveyance, by which a tenant in tail is enabled to alien his lands. Hence it appears that the effect of a common recovery is an absolute bar, not only of all estates-tail, but of remainders and reversions expectant on the determination of such estates: so that a tenant in tail may thus convey his land held in tail to the recoveror, his heirs and assigns, free and discharged of all conditions and limitations in tail, and of all remainders and reversions, except where the reversion is in the crown. 34 & 35 Hen. VIII. c. 20. By 11 Hen. VII. c. 20. also, no woman, after her husband's death, shall suffer a recovery of lands settled on her by her husband, or settled on her husband and her by his ancestors: nor,  
by



by 14 Eliz. c. 8. can any tenant for life suffer a recovery so as to bind them in remainder or reversion; if a tenant for life, with remainder in tail, is desirous to suffer a valid recovery, he must proceed in another mode.

3. The third legal evidence or common assurance of the conveyance of property, is special custom; but this is confined to particular places and a particular species of real property, viz. copyhold lands. These are transferable only in the court-baron of the lord, and is generally done by surrender, to the steward of the court, of a rod, a glove, or other symbol, as custom directs, to be again granted out by the lord to such persons, and to such uses as are named in the surrender, and the custom of the manor warrants: which is done by delivering up the rod or glove, &c. to the new tenant. Upon which admission he pays a fine to the lord, and takes the oath of fealty: formerly the man who surrendered could not name his successor, but the indulgence of the law has now given him a power to do it. No deed or court of law will convey a copyhold estate, it must be surrendered: but if the lord refuses to admit the person named in the surrender, the court of Chancery will compel him; and the lord, on his part, can oblige the person admitted to pay him his customary fine. If a copyhold estate is devised by will; the person to whom it is devised or bequeathed, is intitled to admission: he may even enter on the land before admission, take the profits, may punish any trespass done upon the ground, and, on satisfying the lord for his fine due upon the descent, may surrender into the hands of the lord, to whatever use he pleases.

4. The last method of conveying real property, is by devise or will. Certain restrictions were, by 32 Hen. VIII. c. 1. 34 Hen. VIII. c. 5. formerly laid on devises, to prevent estates being given to religious houses; but now, by construction of 43 Eliz. c. 4. it is held that a devise to a corporation for a charitable use is valid; as being rather an *appointment* than a *bequest*; nay, so favourable are the courts to charitable uses, that a devise by a copyholder, without surrendering to the use of his will, and a devise (nay, even a settlement) by tenant in tail, without either fine or recovery, if made to a charitable use, are good by way of appointment.

To prevent frauds in wills, it is enacted, by 23 Car. II. c. 3. That all devises of lands and tenements shall not only be in writing, but signed by the testator, or some other person in his presence, and by



his exprefs direction, and be fubfcribed in his prefence by three or four credible witneffes. In the conftruction, however, of this ftatute, it is held, that the teftator's name written with his own hand, at the beginning of his will, as for example, " I James Burns do make this " my laft will and teftament," is a fufficient figning, without any name at bottom: it hath alfo been determined, that though the witneffes muft fee the teftator fign, or at leaft hear him acknowledge the figning, they may do it at different times; and that witneffes to wills fhall be difinterefted, it is enjoined by 25 Geo. II. c. 6. that all legacies given to witneffes are void.

Having now confidered the feveral kinds of conveyances whereby titles to lands and tenements may pafs from one to another, it may not be improper to fubjoin a few general rules laid down by the courts, in the conftruction of fuch conveyances.

1. Firft then, the conftruction muft be favourable and reasonable, and as agreeable to the intents of the parties as the rules of law will admit. 2. Where the intention is clear, too minute a ftrefs fhall not be laid on the fignification of words. 3. Bad Latin or ingrammatical Englifh fhall not affect a deed. 4. Conftructions fhall be made on the whole deed, and not on any disjointed part of it. 5. Deeds fhall be conftrued moft ftrongly againft the agent or contractor. 6. Where words will bear two fenfes, one agreeable to the law, the other repugnant; the fenfe moft agreeable to law fhall be preferred. 7. Where two claufes clafh with each other, the firft fhall be received, the latter rejected, except in wills, where the laft fhall be received in preference to the former; but where the two claufes can be reconciled, it fhall be done. And, 8. Wills fhall be favourably explained, to purfue, if poffible, the intent of the teftator.

#### C H A P. IV.

#### OF PERSONAL PROPERTY.

**U**NDER the idea of Perfonalty, or things perfonal, are included all forts of moveable things; but under the general name of Chattels, a French word fignifying goods, is included not only things perfonal, but all fuch property as comes not under the denomination of eftates: in fhort, in all fuch property as has not yet been mentioned.

Now



Now chattels are divided into two kinds, real and personal.

*Real* chattels are such as issue out of, or are annexed to, real estates, and have one quality, *viz.* immobility, which denominates them real; but wanting indeterminate duration constitutes them chattels. Real chattels then are terms for years of land, presentation to churches, estates by statute merchant, statute staple, *elegit*, or the like; of all which we have already treated. *Personal* chattels then are the only property we have now to speak of, such as is moveable; for instance, animals, household furniture, money, jewels, cloaths, corn, &c. and in treating of these we will consider the nature of this property, and how a title to it may be acquired or lost.

Property in personal chattels may be either in *possession*; or in *action*, that is, where a man has merely a right without actual possession of the property.

I. Now property in possession is of two kinds, *absolute* and *qualified*.

1. Property in possession absolute, is where a man hath, solely and exclusively, not only the right, but also the use of any moveable chattels, such as goods, plate, money, jewels, cloaths, vegetables, &c. and domestic animals, such as horses, kine, sheep, swine, poultry, and the like.

2. Qualified property is such as is not in its own nature permanent, but at times may subsist or not. For example, it may subsist in wild animals tamed by art, or in animals confined; such as, ferrets, hawks, deer in a park, hares or rabbits in a warren, fish in a private pond or trunks, &c. These are no longer a man's property, than while he has them in possession: if they stray away and do not return, but are lost, it is lawful for any one to take them: but if a deer or any wild animal tamed, has a collar or mark put upon him, and is suffered to go and return at pleasure, or, if a wild swan be caught and marked, and turned loose in a river, the owner's property still continues, and it is unlawful for any one to take them; but otherwise, if a deer has been long absent, or the swan leaves the neighbourhood. Bees are of the wild kind, which a man has property in, if he hives them. If a strange swarm settles on a tree in my garden, I have no more property in it, till I have hived it, than in the birds on the trees till I have caught them; if another hives it, it is his property; but a swarm flying out of my hive is mine, while I can keep the bees in sight and pursue them. But, if pheasants escape from



mew, or fishes from a trunk, these are free and open to the first that can catch them, though while they are in my possession, the law will protect them. It is as much felony by Common Law to steal such confined animals as are fit for food, as to steal tame ones; but not so, if they are kept only for pleasure, as is the case with dogs, cats, bears, parrots, singing birds, and the like: their value depending on the caprice of the owner: an action will, however, lie for stealing these. Yet to steal a tame hawk is felony, both by Common Law and by statute; a relict of the sportsman's tyranny.

A qualified property may also subsist in hawks, rooks, and other birds building in my trees, rabbits and other animals breeding and burrowing in my grounds: at least till they are able to fly or run away, and then my property expires.

So a man may have a qualified property in wild animals by privilege, as in that of game, which will be shewn hereafter.

Many other things also may be the objects of qualified property, as light, air, water, and the like, in which a man can have no permanent property. If a man obstructs my windows, corrupts the air of my house or gardens, fouls my water, lets it out, or diverts its course, the law will punish him. Property may be also of a qualified nature, according to the circumstances of the owner, when the thing itself is capable of absolute ownership; as when I put them out of my possession, and they are delivered into the charge of another. In this case, neither I, nor the person to whom I deliver them, has any other than a qualified property. Except in the case of a servant, who hath the care of his master's property; and who therefore has no kind of property in the thing he has the care of.

II. Property in action is where a man has not the possession or use, but merely a right to use the thing in question, and the possession of which he may recover by an action at law. Of this kind is money due on a bond, or due from any damage I may sustain; as by a man's breaking his covenants with me.

In all personal property, where a man grants by deed or will, his books, furniture, &c. to *A* for life, with remainder over to *B*, this remainder is good; but if he gives *A* an estate-tail in things personal; that is, if he gives them to *A* and the heirs of his body, with remainder, in default of issue, to *B*; he vests in *A* the total property, and no remainder over shall be permitted on such a limitation: for in  
real



real estates the possessor of an estate-tail can bar the remainder by fine or recovery; but in this case of personal property he cannot.

Things personal, as well as real estates, may belong to their owners, not only in severalty, but also in joint-tenancy and in common. If any personal chattel be given to two persons absolutely, they are joint-tenants, and unless it be sold and the money divided, the doctrine of survivorship shall take place; and in like manner, if one party should sell his share, the buyer and the other party shall be tenants in common. But for the encouragement of husbandry and trade, it is held, that a stock on a farm, though occupied jointly, or a stock in trade in partnership, shall always be considered as common, and not as joint-property; of course there shall be no survivorship therein.

Titles to personal property are next to be considered, or the various methods of acquiring and losing it. These methods are as follow; 1. Occupancy; 2. Prerogative; 3. Forfeiture; 4. Custom; 5. Succession; 6. Marriage; 7. Judgment; 8. Gift, or grant; 9. Contract; 10. Bankruptcy; 11. Will; and, 12. Administration.

I. Occupancy then is one claim or title by which we may acquire personal property.

After a declaration of war, under certain authorities of the state, any one may seize to his own use such goods as belong to an alien enemy, (except such alien be resident in England) and such goods as are brought by such alien into this country, without a safe-conduct or passport. If an enemy take the goods of an Englishman, and they should be afterwards retaken by another subject of this kingdom, the goods so retaken shall become the property of the retaker, unless they were retaken the same day, and the original owner puts in his claim to them before sun-set; though modern authorities declare, that the goods retaken shall be brought into port and continued there a night, so as to take away all hope of recovery, before the property changes, or the retaker can claim them. A man may also acquire a kind of qualified property in the person of an enemy whom he shall take prisoner of war, and may demand a ransom.

Things found, and not claimed by any owner, become the property of the finder or first occupant, provided they do not come under the denomination of waifs, estrays, wreck, or hidden treasure, which belong to the crown.

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The benefits of light, air, or water may also be claimed by the first occupant. If my window originally overlooked the ground, which my neighbour thinks proper to take, he cannot obstruct the light: but if I darken my house by building it close to his wall, I cannot oblige him to remove that wall, the first occupancy or prior right being rather in him than in me. If he should set up any kind of manufactory, that may prove a nuisance to me, by corrupting the air or water, the law will yield me a remedy; but if such manufacture was originally there, and I fix my habitation near it, it is a nuisance of my own seeking, and I have no remedy.

All kinds of animals, except whale, sturgeon, and game, are the property of the first occupant or taker, provided they are caught upon the territories of those who take them.

If by any operation upon a thing, a person shall alter its very kind, he acquires a property in it by such alteration: for example, if he converts another man's fruit into wine, or his wheat into bread, the owner of the fruit or wheat, shall have no claim on the wine or bread; but shall be paid merely for the fruit or wheat. If one man, however, takes away the wife or child of another, and cloaths them, the cloaths shall cease to be the property of the person who furnished them, the instant such wife or child is retaken by the husband or father; they being annexed to the person of the woman or child.

But in mixtures of goods, where one shall wilfully intermix his corn, hay, or other matters, with that of another person, without his approbation, the person so mixing them loses his property, and the other becomes the owner of it.

Under the title of occupancy may be considered what is called literary property, *viz.* the right an author has in his own compositions; it being now settled by 8 Ann, c. 19. amended by 15 Geo. III. c. 53. that the author and his assigns shall have the sole liberty of printing and reprinting his works for the term of fourteen years, and no longer; but if, at the end of that term, the author himself be living, the right shall then return to him for another term of the same duration; and a similar privilege, by 8 Geo. II. c. 13. and 7 Geo. III. c. 38. is extended for the term of twenty-eight years to the inventors of prints and engravings. Patents of privilege are also granted by the King, for fourteen years to the inventor of any new manufacture or machine



machine for the sole working or making the same, vesting thus a temporary property in the patentee.

II. Another method of acquiring property in personals is by the King's prerogative, whereby the King, or any other, under the title of the crown, may claim a right to them.

Of this kind are all tributes, taxes, and customs, whether being branches of the royal revenue, or settled by acts of parliament. Under this head also may be considered all forfeitures and fines.

In these different ways of acquiring property, the King, in one entire thing, can have no *joint* property; but where the claim of the King and a subject join, the King shall have the whole; in the same manner, as where an estate is given to the King and a subject jointly, the King does not become a joint-tenant with the subject, for that would be below his dignity, but he will have the estate wholly to himself. If a bond be made to the King and a subject, the King shall have the whole penalty; or if two persons have a joint debt owing to them on bond, and one of them assigns his part to the King, or is attainted, whereby his moiety is forfeited to the crown, the King shall have the entire debt; for it is a maxim in law, that the King shall never lose his right, and where the interest of a subject interferes with that of the King, the King's shall ever be preferred.

Prerogative gives the King a claim also, as has been before observed, to wrecks, waifs, estrays, treasure-trove, to whale, sturgeon, swans, and the like. Also to a certain kind of copy-right; to the exclusive right of printing at his own press, or that of his grantees, all acts of parliament, proclamations, orders of council, the bible, and books of common prayer; and he is also said to have a right to the copies of such law books, grammars, &c. as were compiled or translated at the expence of the crown.

The King has likewise a right to such *feræ naturæ*, as are called *game*, with an exclusive privilege of pursuing, taking, and destroying them; and no man, but he who has a chase or free-warren by grant from the crown, or prescription, which supposes such a grant, can justify hunting or sporting upon another man's soil, or, indeed in thorough strictness of Common Law, either hunting or sporting at all. By the acquiescence of the crown, and the frequent grants of free-warren, the intention of granting which was in order to protect the game, by giving the free-warrener an exclusive power of killing, provided



vided he prevented others; I say, by these, by the introduction of modern penalties, and by certain statutes for preserving the game, every man, *qualified* as is called, that is, exempted from these penalties, looks on himself at liberty to kill what game he pleases; whereas he has in fact no power to kill game, unless he can shew that he is a free-warrener, or authorized under some act of parliament. The 5th Ann, c. 14. empowers lords and ladies of manors to appoint game-keepers to kill game, for the use of such lord or lady; but this *qualifies* no one except the game-keeper. Modern qualifications of 100l. a year, &c. are merely exemptions from penalties, but do not exempt those who kill game from actions of trespass by the owner of the land; nor if they kill game within the limits of any royal franchise, do they exempt them from the actions of such as have the right of chase or free-warren therein. It is held indeed, that if a man starts any game within his own grounds, and follows it into those of another, and kills it there, he has a property in what he so kills; from the property continuing in his possession by the immediate pursuit. So if a stranger starts game in one man's chase or free-warren, and hunts it into the liberty of another, the property continues in the owner of the chase or warren, for the stranger can have no property in it: or if a man starts game on another's private ground, and kills it there, the property belongs to the owner of the ground; but if, being started there, it be killed in the grounds of a third person; it in this case becomes the property of the killer, though he is guilty of a trespass to both owners.

III. Forfeitures are a third method of acquiring personal property. These arise as punishments for various crimes and misdemeanors: some of them are for offences *mala in se*, bad in themselves, or against the divine law; but the greatest part are for offences against the laws of the land, *mala prohibita*: we will confine ourselves therefore to those offences that incur a forfeiture of *all* the goods and chattels of the offender. Of partial forfeitures, a moiety frequently is the property of the informer, the poor, or other persons; whereas total forfeitures belong to the crown, except in one instance, that of felony in a bankrupt's concealing his effects, in which case alone, they belong to his creditors; of which more hereafter.

The goods and chattels of an offender become totally the property of the crown, that is, are forfeited by conviction of high treason, or  
misprision



misprision of treason ; of petit treason ; of felony in general, and particularly of felony *de se*, and of manslaughter ; nay upon conviction of excusable homicide ; by outlawry for treason or felony ; by conviction of petit-larceny ; by flight in treason or felony, even though the party be acquitted of the fact ; by standing mute when arraigned of felony ; by drawing a weapon on a judge ; or striking any one in the presence of the King's courts ; by *premunire* : by pretended prophecies, upon a second conviction ; by owling ; by the residing abroad of artificers ; and by challenging to fight on account of money won at gaming. All these offences incur a forfeiture of the whole of a man's goods and chattels, of which more will be said hereafter.

In real property these forfeitures commence at the time of committing the fact, but here, in personals, they take place only from the time of conviction ; yet a fraudulent conveyance of them to defeat the interest of the crown is made void by 13 Eliz. c. 5.

IV. A fourth method of acquiring personal property is by the custom of some particular place, or by the general use of the nation. Were I to enter into all the local customs of the kingdom the task would be almost endless ; it shall suffice then to mention three which prevail in most places, *viz.* heriots, mortuaries, and heir-looms.

1. Heriots we have touched on before (see page 105). These are a customary tribute (of Danish original) of goods and chattels reserved in a grant of lands to the lord of the manor, and payable to that lord, on the death of the owner of the lands. In some places it is, at the option of the lord, the best live beast the owner of the land possessed, in others the best piece of furniture, plate, jewels, or the like ; in others again, there is a customary composition in money, as ten or twenty shillings in lieu of a heriot.

2. Mortuaries are a customary gift due to the minister of many parishes on the death of his parishioners, which by 21 Hen.VIII. c. 6. is now settled, where mortuaries are paid, to pay three shillings and four pence for every person who leaves goods to the value of ten marks, and not exceeding thirty pounds ; six shillings and eight pence for every person leaving thirty pounds, and not more than forty pounds ; and ten shillings for every person leaving upwards of forty pounds ; but no mortuary shall be paid for a married woman, a child, a person of full age not a housekeeper ; nor for any way-



faring man ; but such wayfaring man's mortuary shall be paid to the parish to which he belongs.

3. Heir-looms are such goods and chattels, as by special custom, contrary to the nature of chattels, go, with the inheritance, to the heir at law, and not to the executor of the last proprietor : loom signifying limb or branch of the inheritance. They are generally such things as cannot without injury be separated from the inheritance, as deer in a real, authorized park, fishes in a pond, pigeons in a dove-cote, &c. otherwise the rule is, that such personals shall vest in the executor, though expressly given to a man and his heirs. Carriages and household furniture may be heir-looms, in places where there is a special custom to support it, but such custom must be proved ; but in general, fixtures of a house go with the house, such as chimney-pieces, fixed benches, pumps, &c. Monuments or tomb-stones, escutcheons, &c. are also heir-looms every where ; which the parson of the church cannot remove or deface without being liable to an action from the heir. Pews also, by custom immemorial, may descend, without any ecclesiastical concurrence, from the ancestor to the heir : but the heir has no property in the dead bodies of his ancestors. The parson, as owner of the soil, may bring an action against any one that digs or disturbs the ground ; and whoever taking up a dead body, steals the shroud or grave cloths, is guilty of felony ; the property of which being in the person who was at the expence of the funeral.

Heir-looms, though mere chattels, cannot be devised away from the heir by will, they vesting in heirs immediately on the death of the owner ; though the owner in his life-time might have either sold or destroyed them.

V. Another method of acquiring personal property is by succession. This right is universally inherent by Common Law in all aggregate corporations, as dean and chapter, mayor and commonalty, master and fellows, and the like ; in the King, and in such single corporations as represent a number of persons ; for example, the master of an hospital, who represents the poor brethren : or the dean of some ancient cathedral, who represents, in his corporate capacity, the chapter : but this right may, by special custom, belong to certain other sole corporations for some particular purposes, as to the chamberlain of London, who is a sole corporation for the benefit of the Orphan's fund ; but generally in sole corporations no such right can exist.



Chattels left therefore to such a corporation, though their successor be not named, vests an absolute property in them, so long as the corporation subsists. But if chattels be devised to sole corporations, as to the bishop of London and his successors, or the rector of any place and his successors, in such case their executors or administrators shall have them, and not their successors. The King, as a sole corporation, is an exception to this rule, in whom, a chattel interest given to a preceding King, and his successors, shall vest. So in the case of the chamberlain of London, mentioned before: he, by the custom of London, may take bonds and recognizances to himself and successors, for the benefit of the orphan's fund; but for no other purpose; nor can he take a lease for years for himself and successors, to that purpose, the custom extending not to that.

VI. A sixth method of acquiring chattels is by marriage, all personal property belonging to the wife before marriage, being absolutely vested in the husband by marriage. In real estates the husband gains only a title to the rents and profits during the time she is his wife; but in chattel interests the husband has the absolute disposal of them if he chooses to take possession of them; but unless he takes such possession, by exercising some acts of ownership upon them, they shall become at the dissolution of the marriage the property of the wife or her representative.

A real chattel of the wife by marriage vests in the husband, but not absolutely; as in the case of a lease for years, the husband is entitled to all the rents and profits of it, and may, if he pleases, sell, surrender, or dispose of it, during the coverture or the time she is his wife; if he be out-lawed or attainted, it shall be forfeited to the King; it is liable to execution for his debts, and if he survives his wife, it is to all intents and purposes his own. Yet if he has made no disposition of it, and dies before his wife, he cannot dispose of it by will, nor does it go to his executors, but remains vested in his wife, and at her disposal. In like manner, all debts due to the wife before marriage, if not sued for and recovered by the husband, shall after his death be the property of his widow; but upon the husband's receiving them in his life-time, he may dispose of them at his death as he pleases. But in case the husband shall survive the wife, he can claim a real chattel, as was before observed, by survivorship, but not money due to the wife before marriage, except it be arrears of rent,



which in case of her death are given to the husband, by 32 Hen. VIII. c. 37. He may, however, as her administrator, recover any money that was due to her before marriage.

With respect to personal chattels which the wife has in her possession, as money, jewels, furniture, and the like, the husband has, by the marriage, an absolute and immediate property vested in him; which can never afterwards revert in the wife or her representatives.

Such things as are called the wife's *paraphernalia*, a Greek word, signifying something besides her dower, the widow is entitled to on the death of her husband; and he cannot bequeath them away by his will; though during his life he has the power, if unkindly inclined to exert it, to sell them or give them away. If she continues to wear them till his death, she can keep them in opposition to his executors, administrators, and all other persons except creditors, where there are not assets sufficient to pay his debts. Now these *paraphernalia* are the apparel and ornaments of the wife, suitable to her rank and degree: the jewels of a peeress usually worn by her are held to fall under this description; and she is entitled to them over and above her jointure or her dower.

VII. A judgment in a court of law in consequence of some suit or action, is another mode of acquiring personal property. I mean judgment given in favour of penalties inflicted by particular statutes, the whole or a moiety of which goes to the prosecutor or informer.

Damages given by a jury for any injury sustained is another species of property, acquired by judgment. Here also, as in the foregoing, the plaintiff has no claim till after a verdict. Costs of suit likewise come under the same denomination, and may be considered as an acquisition made by judgment of law.

VIII. An eighth mode of acquiring personal property is by gift or grant. Gifts are always gratuitous; grants are upon some consideration or equivalent. Under gifts or grants of *real* chattels may be included all leases for years of land, assignments, and surrenders of those leases, and all the other methods of conveying an estate less than freehold, which have before been considered; though these very seldom carry the appearance of a gift, however liberally bestowed, being generally granted in consideration of five or ten shillings, nominally paid to the grantor, and in case of leases, reserving a small rent, though it be but a pepper-corn; any of which considerations, in the  
eye



eye of the law, will convert the gift into a grant, if executed; into a contract, if not executed.

Grants or gifts of *personal* chattels, may be executed in writing or by word of mouth, before sufficient witness, and possession given in consequence of it. But such a conveyance, if merely voluntary, where creditors or others suffer thereby, is construed as fraudulent. And it is enacted, 3 Hen. VII. c. 4. that all deeds of gift of goods made in trust to the use of the donor shall be void; and every grant or gift of chattels, as well as lands, with intent to defraud creditors and others, shall be void, as against such persons to whom such fraud would be prejudicial; but shall stand good against the grantor himself: and all persons partakers in, or privy to, such fraudulent grants, shall forfeit the whole value of the goods; one moiety to the King, and another moiety to the party grieved: and also on conviction shall suffer imprisonment for half a year.

A proper gift or grant is always accompanied with delivery of possession. If one man gives another a horse or fifty pounds, and puts him in immediate possession, the donor has executed his gift, and has no power to retract it, though he did it without a recompence, unless it prove prejudicial to creditors, or that the donor were under any legal incapacity, as being a minor, a married woman, in confinement, or the like, or unless he were drawn in, or imposed upon by false pretences, drunkenness, or surprize. But, should possession of the gift be not immediately given, it is not properly a gift but a contract, which the donor is not bound to perform, but on good and sufficient consideration; and which we shall next consider.

IX. In all contracts three things are to be weighed, *viz.* the agreement, the consideration, and the different species of contracts.

In an agreement, the contracting parties must be in a capacity to make it. And,

The contract may be either express or implied. *Express* contracts are where the terms of the agreement are particularly specified; as to pay a sum of money, to deliver a horse, or to pay such a price for goods: *implied*, are such as reason and justice dictate; as where a man contracts to do certain work for me, the law implies, that I contracted to pay him a fair price for that work; if the work be not well executed, the law also implies, that I shall be entitled to any damages, I may sustain thereby.

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The consideration is the price or motive of the contract, and must be a thing lawful in itself, or the contract is void. A good consideration, as we before have seen, is that of blood or natural affection between near relations; which may, however, sometimes be set aside, when it tends to defraud creditors or others of their just rights. But a contract for any *valuable* consideration, as for marriage, for money, work done or to be done, or the like, if the value be sufficient, can never be set aside even in equity.

An agreement or contract to do or pay any thing on one side, without any compensation on the other, is totally void in law, however the contractor may think himself bound in honour or conscience to perform it; but bonds given to pay money, and promissory notes, though no consideration can be proved, are binding on the giver, though not to the prejudice of creditors or strangers to the contract.

Let us next consider the different species of contracts. These are, 1. That of sale; 2. That of delivery of goods in trust; 3. That of hiring and borrowing; and, 4. That of debt.

1. Any man may sell his property, unless judgment has been obtained against him for a debt or damages, and the writ of execution is actually delivered to the sheriff; in which case, by the statute of frauds, the sale shall be looked upon as fraudulent, and the property of the goods shall be bound to answer the debt, from the time of delivering the writ: nay, if a defendant dies after the awarding of the writ, and before its delivery to the sheriff, his goods in the hands of the executors are bound by it.

If a man agrees with another for goods, he may not carry them away till he has paid for them, unless with the consent of the seller: but, if the price be agreed for, and the bargain struck, neither are at liberty to be off; provided the goods be tendered by the seller or the money by the buyer. But, if neither money be paid, or the goods delivered, nor tender made, it is no contract, and the owner may dispose of them as he pleases. If any part, however, of the price be paid, or any portion of the goods be delivered as *earnest*, the contract is binding. Indeed, it is enacted by 29 Car. II. c. 3. That no contract for the sale of goods, to the value of ten pounds or more, shall be valid, unless the buyer actually receives part of the goods sold by way of earnest on his part, or unless he gives part of the price to the vender by way of earnest to bind the bargain, or in part of payment;



payment; or unless some note in writing be made and signed by the party or his agent, who is to be charged with the contract. And with regard to goods under the value of ten pounds, no contract for the sale of them shall be valid, unless the goods are to be delivered within one year, or unless the contract be made in writing, and signed by the party who is to be charged therewith. Antiently, among all the northern nations, shaking of hands was held necessary to bind the bargain, and the sale thus made was called a *Handsale*.

The bargain being struck, if the buyer tenders the money to the seller, he may seize the goods, or bring an action against the vender for the recovery of them.

But property may in some cases be transferred by sale, though the goods be not the property of the seller: on this account it is incumbent on the buyer to be cautious. Indeed all sales and contracts of any thing saleable in fairs or open market, in law, is not only good between the parties, but will be binding on all those who have any right or property therein. Country markets are held on particular days, and on particular spots; but every day in London is market day except Sunday, and every shop in which goods are exposed to sale, is a market for such articles as the shopkeeper professes to deal in. But, if a man's goods are stolen, and sold out of open market, he may take them, find them where he may; and it is expressly provided by 1 Jac. I. c. 21. that the sale of any goods, wrongfully taken, to any pawnbroker in London, or within two miles thereof, shall not alter the property. And even in open markets, if the goods sold be the property of the King, such sale will no way bind him, though it binds minors, married women, idiots or lunatics, and men beyond sea, or in prison; or if the goods be stolen from a subject, and then taken from the felon by the King's officer, and sold in open market: still, if the owner has used all diligence in prosecuting the thief to conviction, he does not lose his property in the goods. So likewise, if the buyer knows the property not to be in the seller; or there be any fraud in the transaction; if he knows the seller to be under age, or a married woman not trading for herself; if the sale be not originally and wholly in a fair or market, or not at the usual hours, the owner's property is not bound thereby: if a man buys his own goods in a fair or market, the contract of sale shall not oblige him to pay the price, unless the property had been before altered by a former sale.



sale. And, notwithstanding any number of intervening sales, if the original seller, who sold, without having the property, comes again into possession of the goods, the original owner may take them, when found in his hands who was guilty of the first breach of justice.

In horses, indeed, the property is not easily altered by sale, without the express consent of the owner. For a purchaser cannot claim a horse that has been stolen, unless it be bought in an open fair or market, agreeable to 2 P. & M. c. 7. & 31 Eliz. c. 12. which enact, That the horse shall be openly exposed in the time of such fair and market for one whole hour together, between ten in the morning and sunset, in the public place used for such sales, and not in any private yard or stable, and afterwards brought both by the vender and vendee to the book-keeper of such fair or market; that toll be paid, if any be due; and, if not, one penny to the book-keeper who shall enter down the price, colour, and marks of the horse, with the names, additions, and abode of the vendee and vendor; the latter being properly attested. Nor shall such sale take away the property of the owner, if, within six months after the horse is stolen, he puts in his claim before some magistrate, where the horse shall be found; and within forty days more proves such his property by the oath of two witnesses, and tenders to the person in possession such price as he *bona fide* paid for him in open market: in case any one of the particulars above mentioned be not observed, such sale is utterly void; and the owner shall not lose his property, but at any distance of time may seize, or bring an action for his horse, wherever he may find him.

In law, the buyer may demand from the seller a satisfaction that the goods are his own property; but the vendor is not bound to answer for the goodness of the wares he sells, unless he expressly warrants them to be sound and good, or unless he knew them to be otherwise, or hath used any art to disguise them; or unless they turn out to be different from what he represented them.

2. A delivery of goods in trust, upon an expected or implied contract, that the trust shall be faithfully executed on the part of the person to whom they are delivered, is called in law a *Bailment*, from the French *bailler*, to deliver. As if linen be delivered to a sempstress to make into shirts, she has it on an implied contract to return it made up properly. If goods be delivered to a carrier, he is under an implied contract to carry them to the person to whom they are directed.

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If a horse or other goods be delivered to an innkeeper or his servants, he is answerable for them; nay, he shall answer for them, if stolen within the inn, though not delivered to his care, and though he was not acquainted, that the guests brought the goods there; 8 Co. nay, though he should even tell his guest to take the key of his chamber and lock his door, for that he would not be answerable for them. *Dalt. c. 56. Black. 169.* So if he puts a horse to pasture, without the direction of his guest, and the horse is stolen, he must make satisfaction (but otherwise if with his direction) 8 Co. Caley's case. So peculiarly protected are travellers in their journeys. If goods be distrained for rent or taxes, these are merely pledges for a time in the hands of the distrainers, who are bound by an implied contract to restore them on payment of the money and expences, before the time of sale; or if sold, to return the overplus. If one friend delivers to another any thing to keep for him, the receiver is bound to restore it on demand, but in this case, should the thing delivered be lost or injured, he is not bound to make it good, unless such loss or injury arises from some gross neglect.

The property being thus put into the possession of the person to whom it is delivered, that person may maintain an action against any one that shall injure it, or take it away.

3. Hiring or borrowing are also contracts, by which a qualified property may be transferred to the hirer or borrower; both being under an implied engagement to return the thing hired or borrowed at the time specified. Under this head I am led to speak of the interest usually paid for the loan of money.

The legal interest is five *per centum per annum*, which lenders are authorized to take on personal or real security. They cannot take more without incurring the penalties of usury. They frequently take less on mortgage or land security, but never legally can take more, except on what is called Bottomry or *Respondentia*; policies of insurance; or annuities upon lives.

1st. Bottomry is in the nature of a mortgage of a ship; when the owner borrows money to enable him to proceed on his voyage, and pledges the keel or bottom of the ship to the lender as a security for the repayment of the money on his return. Here it is understood, that if the ship be lost, the lender loses his whole money; if it return, he receives back his principal, and the interest agreed on, which, on



account of the hazard the lender runs, is allowed to be more than the legal interest. The ship and tackle, if brought safe home, as well as the borrower, are, in this case, answerable for the money: but if the money is not lent upon the vessel, but on the lading or merchandize, which must be parted with in the course of the voyage, then the borrower is bound only by the contract, who is here said to take up money at *respondentia*. These terms are also now applied to contracts for the repayment of money borrowed, not on the ship and lading only, but on the mere hazard of the voyage itself, and of course the lender expects a larger than the legal interest. To prevent, however, very usurious contracts, in long voyages, it is enacted, by 19 Geo. II. c. 37. that all monies lent on bottomry, or at *respondentia*, on vessels bound to and from the East Indies, shall be expressly lent only upon the ship and merchandize; that the lender shall have the benefit of salvage, and that if the borrower has not effects on board to the value of the sum borrowed, he shall be responsible to the lender for so much of the principal as hath not been laid out, with legal interest, and all other charges, though the ship and merchandize be totally lost.

2dly. Policies of insurance are contracts between two persons, suppose *A* and *B*; where, upon *A*'s paying to *B* a *premium* or sum equivalent to the hazard run, *B* will indemnify him, or insure him, against any loss. Suppose, for example, a ship be bound to Jamaica, *A* says to *B*, I have a thousand pounds worth of goods on board that ship: should that ship therefore be lost before her arrival at the destined port, on condition you will pay me the thousand pounds, I will give you five *per cent.* or fifty pounds: which, if *B* acquiesces in, he is bound to perform. Thus too, in a loan, if the chance of repayment depends on the life of the borrower, it is usual (besides the common rate of interest) for the borrower to insure his life till the repayment: which generally costs him five *per cent.* or more, according to his age and constitution, which, added to the five *per cent.* he pays for the money, makes the interest he pays ten *per cent.* Let us put a case by way of illustration. *A* has an annuity for his life, and wishes to borrow one hundred pounds on that security: *B* lends it at five *per cent.* interest, but enjoins *A* to insure his life, which he does with *C*, giving *C* five *per cent. per annum*, on condition that he will pay *B* one hundred pounds on his, *A*'s death. On the death, therefore of *A*, *B* receives back his hundred pounds from *C*, for the loan



loan of which, *A* during his life, paid ten *per cent.* that is, five *per cent.* to *B*, and five *per cent.* to *C*: but that *A* may not omit to pay the interest regularly for his life insurance, *B* undertakes to pay it for him, and obliges *A* to charge his annuity with this additional five *per cent.* so that *A* pays the whole ten *per cent.* to *B*, instead of paying it to *B* and *C*. In order, however, to prevent these insurances from becoming a mischievous kind of gaming, it is enacted, 14 Geo. III. c. 48. That no insurance shall be made on lives, or any other event, wherein the party insured hath no interest; that in all policies, the name of such interested party shall be inserted, and nothing more shall be recovered thereon, than the amount of the interest insured.

This does not, however, extend to insurances on voyages at sea; but to preserve good faith and integrity in such insurances, contracts are made void in law, where there is the least shadow of fraud or concealment. But as a practice had crept in of insuring large sums without having any property on board, which were called insurance, *interest or no interest*; and also of insuring the same goods many times over, which became a species of wager or gaming, it is enacted, 19 Geo. II. c. 37. That all insurances, interest or no interest, or without farther proof of interest than the policy itself, or by way of gaming or wagering, or without benefit of salvage, shall be totally null and void, except upon privateers or ships in the Spanish and Portuguese trade, for reasons sufficiently obvious; and that no re-assurance shall be lawful, except the former insurer shall be insolvent, a bankrupt, or dead; and, lastly, that in the East India trade, the lender of money on bottomry, or at *respondentia*, shall alone have a right to be insured for the money lent, and the borrower shall (in case of a loss) recover no more upon any insurance than the surplus of his property, above the value of his bottomry or *respondentia* bond.

3dly. The practice of purchasing annuities for lives at a given price, instead of advancing the same sum by way of loan, takes its rise from the inability of the borrower to give the lender a permanent security to repay the money at any fixed period. He therefore engages, for the sum he wants, to pay so much a year as shall be agreed on, as long as he lives, or till he repays the money; and this annual sum or annuity is more or less, according to the age and constitution of the borrower. To check, however, any usurious dealing in this business,



finess, the 17 Geo. III. c. 26. directs that on the sale of any life annuity of more than the value of ten pounds *per annum* (unless on a sufficient pledge of lands in fee-simple, or stock in the public funds) the true consideration shall be set forth and described in the security itself, and a memorial of the date of the security, of the names of the parties, for whose use it is, and on whose life it is, and the witnesses, and of the consideration money, shall within twenty days after its execution be inrolled in the court of Chancery; else the security shall be null and void; and in case of collusive practices, respecting the consideration, the court in which any action is brought or judgment obtained upon such collusive security, may order the same to be cancelled, and the judgment (if any) to be vacated. And all contracts for the purchase of annuities from infants shall remain utterly void and incapable of confirmation, after such infants arrive to the age of maturity.

Though the legal interest be only five *per cent. per annum*, yet, if a contract be made in a foreign country, our courts will direct the payment of interest according to the law of that country where the contract was made; and by 14 Geo. III. c. 79. all mortgages and other securities upon estates and other property in Ireland or the plantations, bearing interest not exceeding six *per cent.* shall be legal, though executed in the kingdom of Great Britain: unless the money lent shall be known at the time to exceed the value of the thing in pledge; in which case also, to prevent usurious contracts at home, under colour of such foreign securities, the borrower shall forfeit treble the sum so borrowed.

4. The last species of contracts is that of debt; of which there are three kinds, 1. Debts of record, or money due by the judgment or decree of a court of law. 2. Special debts, or money due by deed or instrument under seal, as bond debts, debts of covenant, debts by deed of sale, or by lease reserving rent; and, 3. Simple contract debts, such as book-debts, verbal promises, promissory notes and bills of exchange. Some of these have been mentioned, and some will occasionally be mentioned hereafter. A verbal promise, with sufficient witness, will create a simple contract debt; but it is provided by 29 Car. II. c. 3. That no executor or administrator shall be charged upon any special promise to answer damages out of his own estate; and no person shall be charged upon any promise to answer for the debt or default of another; or upon any agreement in consideration of marriage,



riage, or upon any contract or sale of any real estate, or upon any agreement that is not to be performed within one year from the making; unless the agreement or some memorandum thereof be in writing and signed by the party himself, or by his authority.

A bill of exchange is a draught for money, or an open letter, requesting the person drawn upon to pay a certain sum to a third person specified therein. These bills are either *foreign* or *inland*; *foreign* when drawn by a merchant residing abroad upon his correspondent in England, and *vice versa*; *inland* when both the drawer and the person drawn upon reside within the kingdom.

Promissory notes or notes of hand are engagements in writing to pay a sum specified at the time therein limited to a person therein named, or his order, or sometimes to the bearer at large. These, by 3 and 4 Ann, c. 9. are like bills of exchange made assignable, by the persons (to whom they are made payable) indorsing them, that is, writing his name *in dorso*, or on the back. But by 15 Geo. III. c. 51. all promissory notes, bills of exchange, draughts, and undertakings in writing, being negotiable or transferable, for the payment of less than twenty shillings, are void, and it is made penal to utter or publish any such, they being deemed injurious to trade; and further, all such notes, bills, draughts, and undertakings to the amount of twenty shillings, and under five pounds, are subjected to certain regulations and forms, without an attention to which, they become void, and penal to the person that utters them.

A promissory note payable to *A* or *bearer*, is negotiable without indorsement, and payment of it may be demanded by any bearer. But in a bill of exchange the person to whom it is made payable must go to the person the bill is drawn upon for his acceptance of it; which if accepted either verbally or in writing (the general way is to say *accepted* on the face of the bill), the acceptor makes himself liable to pay it. If he refuses to accept it, and it be of the value of twenty pounds or upwards, and expressed in the bill *for value received*, it must be protested by some notary public resident in the place, or by some substantial inhabitant, witnessed by two persons; that is, proof must be made of the acceptance being refused, in which case it must be returned to the drawer with notice of such protest within the space of fourteen days after.

If



If accepted, and the acceptor refuses or fails to pay it within three days after it becomes due (which three days are called days of grace) it must also in like manner be protested in the mode above described; in which case the drawer or the indorser is bound to pay it, with all expences attending it; but if no protest be made, or notified to the drawer, and any damage arises, the holder of the bill must abide by the loss himself for his neglect.

If the bill be an indorsed bill, the holder, if he cannot get the person it is drawn on to pay it, may demand the money either of the indorser or the drawer; or if there are more indorsers than one, of any of the indorsers; but the first indorser has no one to resort to but the drawer.

What has been said of bills of exchange is applicable to promissory notes, only as in a promissory note, there is no drawer, it is not necessary to protest it on payment being refused.

X. Bankruptcy is another mode of acquiring personal property; this we have touched on before, but will consider it now more fully, and that under four different heads. 1. *Who* may become a bankrupt; 2. What *acts* make a bankrupt; 3. The *proceedings* on a commission of bankruptcy; and, 4. In what manner property may be transferred by bankruptcy.

1. Who may become a bankrupt. The bankrupt laws being designed for the encouragement of trade, none can have the benefit of bankruptcy but *traders*, and these, whether aliens or denizens, *scriveners*, that is, those who receive other mens money in trust; *bankers*, *brokers*, and *factors*; but no farmer, grazier, or drover (unless they deal in wool, hops, or the like; *Str.* 513) nor any receiver of the King's taxes; nor shall any one have a commission of bankruptcy awarded against him, unless at the petition of some *one* creditor to whom he owes one hundred pounds; or of *two*, to whom he is indebted one hundred and fifty pounds, or of *more*, to whom altogether he owes two hundred pounds.

Buying and selling merely will not qualify a man to be a bankrupt; but it must be getting a livelihood by buying and selling: in short, he must be a *chapman*; no handicraftsman, no innkeeper, no schoolmaster, or any one keeping a boarding-house, nor any minor, though a trader, can be legally a bankrupt: though instances have occurred, where clergymen, innkeepers, &c. being traders, have been admitted



admitted to become bankrupts; and married women in London, being, according to the custom of that city, sole traders, are liable to a commission of bankruptcy.

2. What acts will make a man a bankrupt. The bankrupt laws ordain the following; as implying a secreting of the trader from his creditors, or his doing certain acts to defraud them. 1. Departing from the realm with intent to avoid or defraud his creditors. 2. Leaving his house with the same view. 3. Secreting himself in his own house, so as not to be seen, or spoken to, by his creditors. 4. Procuring or suffering himself willingly to be arrested, or out-lawed, or imprisoned, without just and lawful cause. 5. Procuring his money and effects to be attached or sequestered by any legal process. 6. Making any fraudulent conveyance to a friend or trustee, of his lands, tenements, goods, or chattels. 7. Procuring any protection, not being himself a member of parliament, in order to screen his person from arrests. 8. Endeavouring or desiring, by any application to the courts to compel his creditors to take less than their just debts, or to delay the time of payment originally contracted for. 9. Lying in prison for two months or more upon arrest, without finding bail, in order to obtain his liberty. 10. Escaping from prison, after an arrest for a just debt of one hundred pounds or upwards; or, 11. Neglecting to make satisfaction for any just debt to the amount of one hundred pounds within two months after service of legal process for such debt, upon any trader having privilege of parliament.

3. The proceedings on a commission of bankruptcy, are by a proper and legal petition to the Lord Chancellor, who issues out a commission accordingly; but to prevent malicious applications, the petitioners give two hundred pounds security to make the party amends in case they do not prove him a bankrupt: and if they, on the other hand, receive any money or effects from the bankrupt, as a reward for suing out the commission, so as to receive more than their proportion of the bankrupt's effects, they forfeit not only what they have so received, but their whole debt. The commission being issued, the commissioners meet at their own expence, but are allowed twenty shillings each a day, for every sitting. And no commission of bankruptcy shall be interrupted by the death of the King.

Before these commissioners, the bankrupt's accounts and effects are looked into; assignees are chosen by the creditors to vest the bankrupt's



rupt's property in, and the bankrupt is obliged, on notice, to attend the third meeting, and give in his account, and answer such questions as the commissioners shall put to him, and conform to the directions of the statutes of bankruptcy, on pain of suffering death as a felon, and his estate being distributed amongst his creditors. The commissioners may also summon the bankrupt's wife, or any other person touching the bankrupt's affairs, and in case they shall not answer fully to any lawful question, or shall refuse to subscribe such their examination, the commissioners may commit them to prison, without bail, till they make and sign a full answer; and any gaoler permitting such person to escape, or go out of prison, shall forfeit five hundred pounds to the creditors.

The bankrupt on his examination is obliged, by 5 Geo. II. c. 30. on pain of death, to make a full disclosure of all his estate and effects, as well in expectancy as in possession, and how he has disposed of the same: and is to deliver up his books and writings, and all effects in his power (except the necessary apparel of himself, his wife, and children); or, in case he conceals or embezzles any effects to the amount of twenty pounds, or with-holds any books or writings, with intent to defraud his creditors, he shall suffer death.

After the time allowed to the bankrupt for such disclosure, any person voluntarily discovering any part of his effects before unknown to the assignees, shall be entitled to five *per cent.* out of the effects so discovered, and such farther reward as the assignees and commissioners shall think fit: and any trustee willfully concealing the estate of any bankrupt after the last meeting of the commissioners, shall forfeit one hundred pounds to the creditors, and double the value of the estate so concealed. So much in behalf of the creditors. With respect to the bankrupt;

If he conforms to the law and the satisfaction of his creditors; and if they, or four parts in five of them in number and value (but none of them creditors for less than twenty pounds) will sign a certificate for that purpose, the commissioners, authenticating such certificate to the Lord Chancellor, he, or two judges, whom he shall appoint, may allow the same; in which case the bankrupt is entitled to a free discharge for ever from all debts owing by him at the time he became a bankrupt, and shall, if his effects will pay ten shillings in the pound, have five *per cent.* allowed him to begin trade again; if they will pay  
twelve



twelve shillings and six pence in the pound, he shall have seven and a half *per cent.* if fifteen shillings in the pound, ten *per cent.* so that such allowance at five *per cent.* does not exceed two hundred pounds; at seven and a half *per cent.* two hundred and fifty pounds; and at ten *per cent.* three hundred pounds. But should his effects not pay ten shillings in the pound, he is left to the discretion of the commissioners and assignees, to have an allowance not exceeding three *per cent.*

But the bankrupt is not entitled to this allowance, nor to a free discharge from all debts, unless his certificate be signed and allowed; and if he does not make discovery, where any creditor produces a fictitious debt. Nor can he claim them, if he has given with any of his children above one hundred pounds for a marriage portion, unless he had at that time sufficient to pay all his debts; or if he has lost at any one time five pounds, or in the whole one hundred pounds, within a twelvemonth before his bankruptcy, by any manner of gaming or wagering whatsoever; or within the same time has lost to the value of one hundred pounds by stock-jobbing. Also, to prevent frequent fraudulent or careless breaking, men who have been once cleared by a commission of bankruptcy, or have compounded with their creditors, or have been freed by an act of insolvency (which is an occasional act to free persons in confinement, who are too little in debt to become bankrupts, from all debts they may owe, on delivering up to their creditors all their estate and effects upon oath at the sessions or assizes; in which case their perjury or fraud is usually, as in case of bankrupts, punished with death); I say, persons once cleared by any of the aforesaid methods, and afterwards becoming bankrupts again, unless they pay full fifteen shillings in the pound, are only indemnified from imprisonment for their debts; but any future estate they shall acquire remains liable to their creditors, excepting their necessary apparel, household goods, and the tools and implements of their trades.

4. Next, how such proceedings transfer the bankrupt's property. How his *real* estate may be transferred, has been shewn before, (p. 143. sect. 8.) we have only to consider the *personal* estate.

By the bankrupt laws, all the bankrupt's effects are by the commissioners vested in the future assignees of his commissioners, and the commissioners by their warrant may cause any house of the bankrupt to be broke open, in order to seize them: and when the assignees are



chosen by the creditors, the commissioners are to assign all over to them.

This property so vested in the assignees, is the whole the bankrupt possessed at the time he committed the first act of bankruptcy, or that has been vested in him since, before his debts are satisfied; except in the case of a crown debt; for if after the act of bankruptcy committed, and before the assignment of his effects, an extent issues for a debt of the crown, his effects are bound to pay such debts first. But as acts of bankruptcy may be known only to a few, it is enacted, by 19 Geo. II. c. 32. That no money paid by a bankrupt to a real creditor, in a course of trade, even after an act of bankruptcy done, shall be liable to be refunded: nor, by 1 Jac I. c. 15. shall any debtor of a bankrupt, that pays him his debt, without knowing of his bankruptcy, be liable to account for it again.

The assignees may, of themselves, pursue any legal method to recover this property so vested in them, but cannot compound any debts owing to the bankrupt, refer any matters to arbitration, or commence any suit in equity, without the consent of the major part in value of the creditors, at a meeting held in pursuance of a notice in the Gazette.

After paying mortgagees their principal and interest, any arrears of rent due to landlords, and any debt for which pledges or pawns have been deposited as securities, the assignees must within eighteen months pay every creditor that has proved his demand upon oath, in ratable proportions, the sums owing to them, as far as the bankrupt's effects will go. Should there be any surplus, it is to be returned to the bankrupt. But as the rule is, that all interest on debts bearing interest shall cease from the time of issuing the commission, yet in case of a surplus left after payment of every debt, such interest shall again revive, and be paid by the bankrupt or his representatives.

XI, XII. There yet remains two other means of acquiring personal property; testament and administration, which shall be treated of jointly. And here we will consider, 1. Who is capable of making a last will or testament; 2. The nature of a will and its incidents; 3. What are executors and administrators; and, 4. What is their principal office and duty.

1. Every person has full power or liberty to make a will, unless under some special prohibition by law or custom; such as, for want



of discretion ; want of liberty and free-will ; or on account of criminal conduct.

Under the first, are minors, if males, under fourteen ; if females, under twelve ; madmen, idiots, persons grown childish, those whose senses are befotted with drunkenness ; and all persons born deaf, dumb, and blind.

Under the second, are prisoners, captives, and the like, provided their confinement is supposed to destroy their free-will ; also married women, without their husband's consent ; (The Queen-consort is an exception to this rule.) or unless their wills relate merely to such things as they possess, under the office of executrix or administratrix, which can never be the property of the husband ; or unless the property bequeathed be the savings of their pin-money or separate maintenance. And if a single woman makes her will, and afterwards marries, such marriage makes the will void.

Under the third incapacity, are all traitors and felons from the time of their conviction, their property being forfeited to the King ; all self murderers who can only devise their lands, their chattels being forfeited ; and outlaws also, so long as their outlawry subsists, for during that time their effects are forfeited.

2. Wills are of two sorts, *written* and *verbal* ; a *codicil*, from *codicillus*, a little writing, being only a supplement to a will.

A written will of personal property, written in the testator's own hand, though it has neither his name nor seal to it, nor witnessed, provided the hand-writing can be proved, is good ; and though written by another, and not signed by the testator, yet, if proved to be according to his instructions, and approved by him, is a good will of a personal estate.

Verbal or nuncupative wills or codicils being liable to great impositions, it is enacted, 29 Car. II. c. 3. That no written will shall be revoked or altered by a subsequent nuncupative one, except the same be in the life-time of the testator reduced to writing, and read over to him and approved ; and unless the same be proved to have been so done by the oaths of three witnesses, such as are admissible upon trials at Common Law : 4 and 5 Ann, c. 16. That no nuncupative will shall in any wise be good, where the estate bequeathed exceeds thirty pounds, unless proved by three such witnesses, present at the making thereof, and unless they or some of them were specially required to



be a witness thereto by the testator himself; and unless it was made in his *last* sickness, in his own habitation or dwelling-house, or where he had been previously resident ten days at the least, except he be surprized with sickness on a journey, or from home, and dies without returning to his dwelling. That no nuncupative will shall be proved by the witnesses after six months from the making, unless it were put in writing within six days: nor shall it be proved till fourteen days after the death of the testator, nor till process hath first issued to call in the widow or next of kin to contest it, if they think proper.

Wills are of no validity if made by a person labouring under any of the incapacities before-mentioned: if a will of a later date be proved, or if the will made be afterwards revoked or cancelled. Even without an express revocation, if a man who hath made his will, afterwards marries and has a child, this in law is implied revocation of the will made when he was single. It has been supposed that unless a man in his will mentions every child, and leaves some trifle to each, he had lost his reason when he made such will, and of course that it is void. But the law of England supposes no such insanity, and therefore though the heir or next of kin be totally omitted, such a will is not set aside.

3. We are next to consider what are executors and administrators.

An executor is the person to whom a testator commits by will the execution of his will. And not only persons that are capable of making a will themselves, are capable of being executors, but also married women and infants, nay infants unborn, in the womb of their mother; but no infant can act before seventeen years of age, till which time administration must be granted to some other; so must it, if the executor be abroad, or while the validity of the will is in contest. But where a will is made, and no executor named, or if incapable persons are nominated, or executors refuse to act; the bishop of the diocese must grant administration to some other person, in which case the duty of an administrator differs little from that of an executor.

Where a man dies intestate, the ordinary or diocesan is, 1. obliged to grant administration of the effects of the wife, to the husband, or his representative, and of the husband's effects to the widow or next of kin; but he may grant it to either or to both, as he pleases.

2. Among



2. Among the relations he must prefer those that are nearest of kin to the deceased; but of persons of equal kindred, he may appoint whom he thinks proper. 3. With respect to nearness of kin, children, or (if there be no children) the parents of the deceased are entitled to administration; then brothers, grandfathers, uncles, or nephews (and the females of each class respectively); and lastly, cousins. 4. The half blood, though excluded from inheritances of land, are here admitted; therefore the brother of the half blood shall exclude the uncle of the whole blood, and the ordinary may grant administration either to the half sister or the whole brother at his discretion. 5. Where none of the relations will administer, a creditor, by custom, may do it. 6. If the executor refuses or dies intestate, administration may be granted to the residuary legatee, in exclusion of the next of kin; and in defect of all these, the ordinary may grant administration to any discreet person he pleases, it being the office of the ordinary to keep the goods in safe custody, and do other acts for the benefit of such as are entitled to the property of the deceased. If a bastard, or any one without kindred, dies intestate, and without wife or child; any person procuring authority from the crown, may oblige the ordinary to grant him administration.

An executor may devise by will his office to his own executor; that is, the executor of *A*'s executor is to all intents and purposes the executor and representative of *A*; but the executor of *A*'s administrator, or the administrator of *A*'s executor is not the representative of *A*; in both these cases the ordinary must grant fresh administration.

4. Let us now enquire into the chief duties of an executor or administrator: which are much the same in both; only that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration. An executor also may do many acts before he proves the will, which an administrator cannot, an administrator deriving his power not from the will, but the probate, and the appointment of the ordinary. If a stranger takes upon him to act as executor by intermeddling in the affair of the deceased, without authority, he is liable to all the trouble of an executorship without any of the advantages; but merely doing necessary or humane acts, such as locking up the effects, or burying the corps, is not taking up the office of an executor. Such a one cannot bring an  
action



action himself in right of the deceased, but actions may be brought against him. He is liable to pay the debts of the deceased as far as he has in hand assets sufficient, and shall be allowed in his account all payments made to any creditor except himself, provided such payments are made to creditors of the same or a superior degree to those unpaid, as will be explained below; and though he cannot plead such payment against the demand of a rightful executor or administrator, yet it shall be allowed him in mitigation of damages; unless perhaps where there are not sufficient assets left to pay that rightful executor.

The duty of a rightful executor or administrator is to bury the deceased in a manner suitable to the property he leaves. Necessary funeral expences are first allowed: if he is extravagant in the funeral, it shall be only prejudicial to himself, and not to the creditors or legatees of the deceased, for they must be first paid before any extravagance be allowed. He must also prove the will of the deceased, by swearing to it before the ordinary or his surrogate, or where its validity be disputed, by bringing witnesses; the certificate given of this proof is called the *Probate*. In defect of any will, the person entitled to be administrator must take out letters of administration under the seal of the ordinary, to empower him to act, and he must, by 22 & 23 Car. II. c. 10. enter into a bond with sureties to execute his trust faithfully: but if the effects of the deceased lie in two different dioceses, amounting to five pounds in each, the will must be proved before the archbishop of the province. The executor or administrator is also, if required by the ordinary, to make an inventory of the goods and chattels of the deceased, and deliver it in to him upon oath. He is to collect all the effects so inventoried, and has the same property in them as the principal had when living, and the same remedies to recover them. In case of two or more executors, a sale or a release by one binds the rest; but not so in case of two administrators. All such goods and chattels as are saleable, and can be converted into money, are called *Assets*, and as far as these will go the executor or administrator is liable to pay a creditor or legatee. He may convert them into money for that purpose. In paying debts he must observe the rules of priority, otherwise, where there are not assets sufficient, if he pays debts of a lower nature first, he must pay those of a higher out of his own property. After paying all funeral charges, and the expences



expences of the probate, and the like, he must pay debts due to the King on record or specialty; then such as are by particular statutes to be preferred to all others, as forfeitures for not burying in woollen, money due for poor's rates, for letters to the post office, and some others; then debts of record, such as judgments, statutes, and recognizances; then debts due on special contracts, such as rent, bond-debts, covenants, and the like, under seal; then servants wages; and, lastly, all simple contract debts, such as book debts, promissory notes, bills of exchange, and verbal promises. Of all debts of equal degree, he may pay himself first, provided he is the rightful executor or administrator, not else. If a creditor appoints a debtor to be his executor, he, in this act, discharges the debt, whether the executor acts or no, provided there be assets sufficient to pay his debts. If no suit be commenced against the executor, he may pay any one creditor in equal degree his whole debt, though he has nothing left for the rest; as without a suit commenced, the executor has no legal notice of the debt.

The debts all discharged, the legacies are next to be paid, as far as the assets will extend: but the executor or administrator cannot, as in the case of a debt, pay himself first. Where there is a deficiency of assets all the *general* legacies must abate proportionably, but a *specific* legacy (of a piece of plate, a horse, or the like) is not to abate at all, unless there be not sufficient to pay the debts. Where legacies are even paid, the legatees are bound to refund in proportion, if debts unknown before, come in, in order to pay them.

Where the legatee dies before the testator, the legacy is lost or lapsed, and shall go to the general stock. If a legacy be left to any one *when* he attains, or *if* he attains, the age of twenty-one, and he dies before that age, it is a lapsed legacy; but if it be left *to be paid* when he attains the age of twenty-one, it is a vested legacy, and if the legatee dies before that age, his representatives shall receive it out of the testator's personal estate, at the time it would have been payable had the legatee lived. But if such legacies be charged on a real estate, in both cases they should lapse for the benefit of the heir. In vested legacies due immediately, and charged on land or money in the funds, interest shall be payable thereon from the testator's death; if charged only on the personal estate, which cannot be immediately got in,



in, they shall bear interest only from the end of the year after the death of the testator.

Nothing given as a legacy can be taken by the legatees, without the consent of the executor or administrator; except a person in his last moments should deliver or cause to be delivered to another, to keep in case of his decease, the possession of any personal goods, bonds, or bills drawn by the deceased upon his banker: yet even these gifts shall not prevail against creditors.

All debts and legacies being discharged, the surplus, if any, must be paid to the residuary legatee, if any be appointed in the will; if not, it shall be the property of the executor, provided he has no legacy left him, and there appears nothing on the face of the will to imply the contrary: otherwise, it shall go to the next of kin, as it would, was there only an administrator. With respect to the property of intestates, where no will is made, after his debts are paid, it is enacted, by 22 & 23 Car. II. c. 10. That the surplus, (unless the intestate be a married woman) shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner: One third shall go to the widow, and the residue in equal proportions to his children, or, if dead, to their representatives; if no widow, the whole shall go to the children; if no children, the whole shall be distributed among the next of kin in equal degree, and their representatives: but no representatives are admitted among collaterals farther than the children of the intestate's brothers and sisters. The next of kindred are to be settled as was before pointed out among those entitled to letters of administration; and therefore the father succeeds to all the personal effects of his children dying intestate and without issue, in exclusion of the brothers and sisters of the deceased: but by 1 Jac. II. c. 17. if the father be dead and the mother alive, the personal effects of such children shall go equally to the mother and her remaining sons and daughters or their representatives.

In another part of the statute of distributions, it is directed, that no children or child of the intestate (except his heir at law) on whom he settled in his life-time any estate in lands, or pecuniary portion equal to the distributed shares of the other children, shall have any part of the surplusage with their brothers and sisters; but if the estates so given them, by way of advancement, are not quite equivalent to the other shares, the children so advanced shall now have so much as will make them



them equal. This statute of distributions, however, expressly excepts and reserves the customs of the city of London, the province of York, and other places having peculiar customs of distributing intestate's effects.

In these places, *viz.* the city of London and province of York, and in the kingdom of Scotland, the personal estate of an intestate, after payment of his debts, are distributed as follows. If the deceased leaves a widow and children, his effects (deducting the widow's apparel, and the furniture of her chamber, which are her own) are divided into three parts, one of which shall go to the widow, another to the children, and a third to the administrator: if only a widow, or only children, the widow or children shall have one half, and the administrator the other: if neither widow nor child, the administrator shall have the whole. But 1 Jac. II. c. 17. ordains, that the administrator's part shall also be distributed. The distribution by this statute is thus: The personal estate of a man dying intestate, and leaving a widow and two children, shall be divided into eighteen parts, of which the widow shall have eight; that is, six by the custom, and two by the statute; and each of the children five; that is, three by the custom, and two by the statute. If he leaves a widow and one child, she shall still have eight parts as before, and the child shall have ten; that is, six by the custom, and four by the statute: if he leaves a widow and no child, the widow shall have three fourths of the whole, that is, two fourths by the custom, and one by the statute; and the remaining fourth shall go to the next of kin. But if the wife be provided for by a jointure before marriage, in bar of her customary part, she shall be entitled to her share of the administrator's part, unless barred by special agreement. And if any of the children are advanced by their father in his life-time with any sum of money (not amounting to their full proportionable part) unless such children consent to divide the money so advanced with the rest of the brothers and sisters, in equal proportions with the remainder of the property to be divided among them, they shall not be entitled to any benefit under the custom: and if they are fully advanced, the custom entitles them to no farther dividend. So far the customs of London and York agree. But,

In London the share of the children is not fully vested in them till the age of twenty-one; nor can they dispose of it by will before; and

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if they die under that age, single or married, their share shall devolve to the other children. And in the province of York the heir at common law, who inherits any land, either in fee or in tail, is excluded from any child's part.

In these places, viz. the city of London and province of York, and in the kingdom of Scotland, the personal estate of an intestate, after payment of his debts, are distributed as follows. If the deceased leaves a widow and children, his effects (bedding, the widow's apparel, and the furniture of her chamber, which are her own) are divided into three parts, one of which shall go to the widow, another to the children, and a third to the administrator: if only a widow, or only children, the widow or children shall have one half, and the administrator the other: if neither widow nor child, the administrator shall have the whole. But 1 Jac. II. c. 17. ordains, that the administrator's part shall also be distributed. The distribution by this statute is thus: The personal estate of a man dying intestate, and leaving a widow and two children, shall be divided into eighteen parts, of which the widow shall have eight; that is, six by the custom, and two by the statute; and each of the children five; that is, three by the custom, and two by the statute. If he leaves a widow and one child, the child shall have eight parts as before, and the widow shall have ten; that is, six by the custom, and four by the statute: if he leaves a widow and no child, the widow shall have three fourths of the whole, that is, two fourths by the custom, and one by the statute; and the remaining fourth shall go to the next of kin. But if the wife be provided for by a jointure before marriage, in part or her customary dower, she shall be entitled to her share of the administrator's part, which is barred by special agreement. And if any of the children are advanced by their father in his life-time with any sum of money (not amounting to their full proportionable part) unless such children consent to divide the money so advanced with the rest of the brothers and sisters, in equal proportions with the remainder of the property to be divided among them, they shall not be entitled to any benefit under the custom: and if they are fully advanced, the custom entitles them to no further dividend. So far the customs of London and York agree. But in the province of York, the children are not fully vested in their till the age of twenty-one; nor can they dispose of it by will before; and



# A VIEW OF THE LAW.

## B O O K III.

### ON PRIVATE INJURIES.

#### CHAP. I.

#### OF SELF REDRESS, AND REDRESS BY THE OPERATION OF LAW.

HAVING in the foregoing books largely considered the *rights* of persons and things, we will now proceed to the *wrongs* or injuries, which are no other than a privation of right.

Wrongs are of two species, *private* and *public*. Private wrongs are an infringement of the rights of individuals, and therefore called *civil injuries*; public wrongs are a violation of public rights, and are called *crimes* and *misdemeanors*. Civil injuries then shall be the subject of this book: crimes and misdemeanors that of the concluding one.

To accomplish the redress of civil injuries courts of justice are established, and our remedies are by applying to these courts by civil suit or action: our business, therefore, here, will be to enquire how this is to be done. Some injuries then may be redressed by the parties themselves; some by the act or operation of law, and others by suit or action in courts. Of the first two we will speak at present, the third shall be the subject of another chapter.

I. Some injuries then we are allowed to redress ourselves. As in self-defence, or the mutual and reciprocal defence of husband and wife, parent and child, master and servant. Here, if a man, or any of these his relations, be forcibly attacked in their persons or properties,



it is lawful for him to repel force by force, and he only is guilty of a breach of the peace who first began the affray; but care must be taken, that the resistance a man makes does not exceed the bounds of mere defence, lest he should thus become a transgressor.

II. Recaption or reprisal is another species of self-redress, which the law allows a man occasionally to take. Where any one is deprived of his personal property, or where a man's wife, child, or servant is wrongfully detained from him, he may lawfully claim and retake them, find them where he may; so as it be not in a riotous manner, or attended with a breach of the peace; for was a man in such a case to wait for a legal remedy, it might be impossible to recover them without their or his receiving some injury. If my horse be taken away, and I find him in a common, or fair, or public inn, I may legally seize him: but I cannot justify the breaking open a private stable, or entering on the grounds of a third person to take him, unless he be stolen; but must have recourse to an action at law.

Where one person has, without any right, taken possession of another's estate, forcible entry by the injured party to recover it, is, on some occasions, allowed; but as these are nice cases, we shall speak more of them hereafter.

III. A third species of redress which the law allows a man to take himself, is in the removal of nuisances, of which likewise we shall speak more hereafter; I shall only observe at present, that whatsoever annoys or injures another is a nuisance, and the party aggrieved is justifiable in removing such an offence, if he can do it without committing a riot. He may, for example, enter his neighbour's ground, and peaceably pull down a wall erected so near him as to darken such of his windows as have subsisted time out of mind. If a new gate be erected across a public highway, it is a common nuisance, and any person passing that way may cut it or break it down; for, such injuries the law supposes to require an immediate redress.

IV. The next case where the law allows a man to be his own avenger, is that of distressing cattle or goods for arrears of rent, or trespassing upon his lands. And here, as the law of distress is proper to be thoroughly known, we will consider it minutely, and enquire, for what injuries a man may distress; what things he may take, and the manner of taking, disposing of, or avoiding distresses.

1. For



1. For what injuries then may a man distrein? Distreining is seizing the property of another man; and a landlord may do this, that is, distrein the stock or goods of his tenant for non-payment of rent; but it must be for rent in arrear. *Burn. Distress.* The lord of a manor may distrein for a man's neglecting to do suit to the lord's court: distress may be had for fines in a court-leet; but not fines in a court-baron, without a special custom to authorize it. The owner of land may distrein any strange cattle he finds wandering in his grounds and doing him damage. Remedy by distress and sale is given also for several duties and penalties inflicted by special acts of parliament.

2. All personal chattels are liable to be distreined, unless particularly exempted. The exemptions are dogs, cats, rabbits, and all *feræ naturæ*, except deer that are kept in a private inclosure. Except also whatever is in the personal use of a man, as the ax in his hand, with which he is cutting wood; the horse he is riding; but horses drawing a cart, (if a man be not on it, 1 *Vent.* 36.) may, cart and all, be distreined for arrears of rent. But a horse trespassing in another man's ground, may be distreined and led to the pound, though a man be on his back. Valuable things, not belonging to the transgressor, but in his possession merely by way of trade, shall not be liable to distress, such as a horse standing at an inn, or in a smith's shop to be shod, corn sent to a mill, or cloth to a taylor; but, generally speaking, whatever goods and chattels the landlord finds upon the premises, whether they belong to his tenant or a lodger, he may distrein them for rent, and the lodger has his remedy only by action against the tenant. So cattle put out to pasture, or strangers' cattle trespassing upon land, may be distreined by the landlord of that land, for any rent the tenant may be in arrear, and the stranger hath his remedy against the tenant; but if the fences of such land be bad, and strangers' cattle stray into the ground, the landlord cannot distrein them, unless they have been in one night; but was it the landlord's or tenant's business to repair such fences, and they neglected to do it, the landlord could not distrein them, till notice be given to the owner that they are there, and he neglects to remove them. A man's tools and utensils of his trade are also privileged from distress. And further, nothing is liable to be distreined, that cannot be returned in as good condition as when it was taken, such as milk, fruit, and the like; a distrein being, in the nature of a pledge or security, to be re-



turned when the debt is paid. Lastly, things fixed to the freehold may not be distreined, as coppers, windows, doors, chimney-pieces, &c. for these are part of the inheritance; but by 11 Geo. II. c. 19. landlords are empowered to distrein corn, grafs, or other products of the earth, while growing, and to cut and gather them when ripe.

3. Let us next see how things distreined may be taken, disposed of, or avoided. In pointing out the mode of distreining, I shall suppose it to be for rent, and remark the differences, where necessary, between distress for rent and distress for other causes.

All distresses then must be in the day-time, except for trespass, which is called *damage-feasant*, lest cattle should escape before taken; and in distreining, the landlord or his bailiff must enter on the premises any time within the continuance of the lease, or within six months after its determination, provided he continues landlord, and the tenant continues in possession. Should the tenant's goods be clandestinely removed off the premises, he may distrein them wherever he finds them, within thirty days after their removal, unless they have been *bona fide* sold for a valuable consideration, and all persons privy to, or assisting, such fraudulent conveyance, forfeit double the value to the landlord. The landlord may also distrein his tenants' beasts feeding upon any common belonging to the demised grounds, and he may, by the assistance of a peace officer of the parish, break open, in the day-time, any place where the goods may have been fraudulently removed and locked up to prevent a distress, oath being first made, in case it be a dwelling-house, of there being reason to suspect a concealment of such goods there.

By 8 Ann. c. 14. s. 6, 7. After the expiration of a lease or term, the landlord may distrein for arrears of rent; provided such distress be made in six calendar months, after the expiration of such lease or term, during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrear became due.

A man entitled to distress, should distrein for his whole demand at once; but, if there be not sufficient property on the premises, or should he happen to mistake the value of the thing distreined, so as not to take sufficient to answer his demand, he may distrein a second time; for should he take unreasonable distress for arrears of rent, he is liable, by 52 Hen. III. c. 4. to be heavily amerced or fined for so doing.

Distress



Distress being, taken it must be carried by the taker to some pound, and there impounded or shut up; but, in their way there, if the distress for rent be taken illegally, for example, on the highway or the like, or without cause, no rent being due, the tenant may rescue the distress; but if they are once impounded, even though taken without cause, they are in the custody of the law, and the tenant cannot get them out but by legal means.

Pounds are called *Pound-overt*, that is, open overhead, and *Pound-covert*, close overhead. By 1 & 2 P. & M. c. 12. no distress of cattle can be driven out of the hundred where it is taken, unless to a pound-overt within the same shire, and within three miles of the place where it is taken; that the tenants may know where to look for them: but, by 11 Geo. II. c. 19. any person distressing for rent may turn any part of the premises, on which a distress is taken, into a pound for securing of such distress. If animals be impounded in a *common* open pound, the owner must take notice of it at his peril; but if in any other open pound, so constituted for the purpose, the distresser must give the owner notice: and in both these cases, the owner is to provide the beasts with food. But if they are put into a close pound, as a stable or barn, the landlord or distresser must feed them. Household goods or other things liable to be damaged or stolen, should be put in a close pound, or the distresser must answer for the consequences.

Where the owner of a distress thinks himself aggrieved, and wishes to contest the matter with the distresser, he must *replevy* the distress, that is, he must apply to the sheriff or his officers, and give security to try the matter in a court of law, in which case the distress will be restored to him, he being then bound to return the cattle or goods into the hands of the distresser, or pay him his demand with the expences, in case it be given against him. But of this more hereafter.

If a distress be not replevied, or the money paid, the distresser is authorized to sell the distress and pay himself. For a debt due to the crown, unless paid within forty days, the distress is saleable; the lord may also sell for an amercement or fine imposed at a court-leet; it being in the nature of an execution to levy a legal debt. In distresses for non-payment of duties established by acts of parliament, power of sale is likewise given to complete the remedy; and by several statutes, in all cases of distress for rent, if the tenant or owner does not, within

five



five days after the distress be taken, and notice of the cause thereof given him, replevy the same, with sufficient security, the distreinor, with a constable, shall get it appraised by two sworn appraisers, and sell it to satisfy the debt and charges, returning the surplus, if any, to the owner. And it is provided, by 11 Geo. II. c. 19. That for any unlawful act done in distreining, the party aggrieved shall only have an action for the real damage sustained, and not even that, if tender of amends is made before any action be brought. But, by 2 W. III. sess. 1. c. 9. s. 3. If any distress and sale shall be made for rent in arrear and due, when none is in truth due, the owner shall recover double value, with costs. Neither gates nor inclosures may be broken open nor thrown down, to make a distress; 1 *Inst.* 161. Nor may the lessor enter into the tenant's house, unless the doors are open. *Read.* Distress. 2 *Bac. Abr.* 111. But if the outer door be open, one may break the inner door to make a distress. *Cases in the time of Hardwicke*, 168. A landlord entering a house and seizing some goods, in the name of the whole, will be a good seizure of all. 6 *Mod.* 215. An innkeeper may also detain the goods of his guest for the reckoning.

V. Seizing of heriots due on the death of a copyholder is the last kind of self-remedy. Similar to this is the seizing of waifs, wrecks, estrays, deodands, and the like; the person intitled to them being justifiable in seizing them, though they might recover them by action.

There are also two modes of settling disputes between the parties themselves, without any recourse to a court of law. These are agreement called *accord*, and *arbitration*.

*Accord* or agreement is the matter amicably settled, and satisfaction agreed on between the aggressor and party injured, which, when performed, bars all actions on that account; as where a man accepts a sum of money of another for any injury he may have sustained in that person's breach or failure of contract. By several late statutes, in case of irregularity in the mode of distreining, and mistakes of magistrates in their office, even *tender* of sufficient amends to the party injured is a bar to all actions, whether he accept it or not.

*Arbitration* is where the matter in dispute is left to the decision of two or more *arbitrators*, who, should they disagree, refer it to the determination of a third person nominated by them, which third person is called an *Umpire*, and his *award* or determination is final: of course certain



certain and fixed debts cannot be the subject of arbitration, the end of which is to reduce uncertain debts to a certainty. 1 *Bac. Abr.* Arbitrament A. The right also of real property cannot pass by a mere award, yet an arbitrator may award a conveyance or release of land. To make arbitrations valid, the parties disputing enter into mutual bonds of arbitration, covenanting to abide by the award: and the legislature has now established the use of awards, as well in matters where causes are depending, as in those where no action is brought; enacting, 9 & 10 W. III. c. 15. That all merchants and others, who desire to end any controversy, (in which there is no other remedy but by personal action or suit in equity) may agree that their submission of the suit to arbitration or umpirage shall be made a rule of any of the King's courts of record: and after such rule made, the parties disobeying the award shall be liable to be punished, as for a contempt of court; unless such award shall be set aside, for corruption or other misbehaviour in the arbitrators or umpire, proved on oath to the court, within one term after the award is made.

A submission to an award by words is good, and the party in whose favour the award is made, may enforce the performance; but as either party may revoke such submission at pleasure, any time before the award is made, submission should be made by bonds. *Compl. Arb.* 7. Submission made by bond may even be revoked, in writing, but then the revoker forfeits the obligation of that bond. 8 *Co.* 82. And if the submission be made a rule of court, pursuant to the act above-mentioned, if either party revokes, the court will grant an attachment. *Compl. Arb.* 2. Arbitrators cannot injoin an oath to the witnesses. *Burn.* Award. Nor can they proceed after they have once named an umpire. *Rep. of Pract. in C. B.* 116. And to make awards good, they must be possible and lawful, beneficial to each party, and also certain and final. *Wood. b.* 4. c. 3.

Remedies for private wrongs are sometimes effected by the mere operation of law.

1. If one man indebted to another makes his creditor his executor, or if such creditor obtains letters of administration to his debtor, the law allows him to pay himself out of the effects of the deceased, before any other creditor whose debts are of equal degree: but no executor is allowed to retain his own debt, in prejudice to that in equal degree of a brother executor, but both shall be discharged in proportion:

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neither can any executor retain such debt, unless he be appointed executor by the will of the deceased.

2. Where a man, out of possession of lands of which he is the real owner, and has no right to enter, without receiving possession by law, becomes afterwards possessed of them, by some defective title; in this case the law *remits* him or sends him back to his original title: the right of entry gained by a bad title shall be supported by his original good one. But if such subsequent possessions be obtained by his own act or consent, as for example, by purchase when of full age, he shall not be remitted, that is, not hold his estate by virtue of his former right, his purchase implying a waving of that right.

## CHAP. II.

### OF COURTS.

**T**HE next object of our enquiry is the redress of injuries by application to Courts of Law. It is a general rule, that where there is a legal right, there is a legal remedy by suit in courts. I will consider then the nature of the several species of courts of justice, and point out what injuries are cognizable in each respective species.

The great variety of courts has arisen from the legislature's wish to expedite and yield impartial justice between man and man. With this view, some courts have a more limited, others a more extensive jurisdiction. Some are constituted to enquire only; others to hear and determine; some to determine in the first instance; others upon appeal, and by way of review. But they are all *Courts of record*, or *not*. A court of record is where its judicial proceedings are recorded or registered; it being a maxim at law, that no plea, or even proof, be admitted against a record. All courts of record are the King's courts, and no other hath authority to fine or imprison. Courts not of record are the courts of a private man; such as the courts baron belonging to manors, which the law will not trust with any discretionary power over the fortune or liberty of the people.

The three chief parties on a trial are the plaintiff, the defendant, and the judge who tries the cause; but in the superior courts there are attorneys and counsel, as assistants.

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An attorney at law is a similar officer to a proctor among the civilians, whom the plaintiff or defendant appoints to appear for him, and to manage and conduct his cause. Formerly every futor was obliged to appear for himself, as is the case now in criminal cases. An idiot cannot to this day appear by attorney, not having discretion to enable him to appoint a substitute; but where an idiot appears, the judges are bound to take care of his interests. These attorneys are now formed into a regular body; are admitted to the execution of their office by the courts of Westminster Hall, and, when admitted, are officers of those courts that admit them. For no attorney can practise in any court but where he is admitted and sworn. To practise in the court of Chancery, a man must be admitted there as a solicitor: nor by 22 Geo. II. c. 46. can any attorney act at a court of quarter-sessions, but such as have been regularly admitted in some superior court of record.

Of counsel there are two degrees, barristers and serjeants. Barristers are admitted or called to the bar, after a certain period of standing in the inns of court. After sixteen years standing, they may be called to the degree of serjeants, or *servientes ad legem*. Serjeants are sworn to do their duty to their clients, that is, to those who employ them as advocates. The judges of the courts of Westminster are always admitted serjeants before they are advanced to the bench. From both serjeants and barristers, the King's counsel are usually selected, the two principal of whom are called his attorney and solicitor-general. The King's counsel must not be employed in any cause against the crown, without special licence. Of late years a custom has prevailed of the King's granting precedence to such barristers he is pleased to honour with this mark of distinction, which entitles them to be heard before others, usually after his own counsel. These, as well as the Queen's attorney and solicitor-general, rank promiscuously with the King's counsel, and sit, with them, within the bar of the different courts, but receive no salaries, and are not sworn; of course, are at liberty to be retained or employed in causes against the crown. Counsel are supposed to plead *gratis*, of course they can maintain no action for their fees, and to encourage in them a freedom of speech in the lawful defence of their clients, a counsellor is not answerable for any matter by him spoken, though it should prove groundless, and reflect on the reputation of another; provided it relates to the



cause he espouses, and is suggested in his client's instructions; but if he utters an untruth of his own invention, or even upon instructions, if it be foreign to the cause in question, he is liable to an action from the party injured. By Westm. 1. 3 Edw. I. c. 28. counsel guilty of deceit or collusion are punishable with imprisonment for a year and a day, and perpetual silence in the courts.

Pre-audience or a right of being first heard in courts is sometimes of so much consequence, that it may not be amiss to shew the precedence usually observed. 1. The King's premier serjeant. 2. The eldest of the King's serjeants. 3. The King's advocate-general. 4. The attorney-general. 5. The solicitor-general. 6. The King's serjeants. 7. The King's counsel, with the Queen's attorney and solicitor. 8. Serjeants. 9. The recorder of London. 10. Advocates of the Civil Law. 11. Barristers in general. In the court of Exchequer, two of the most experienced barristers, called the *Post-man* and the *Tub-man* (from the places in which they sit) have also a precedence in motions.

The several species and distinctions of courts of justice come next under consideration, and these are either those whose jurisdiction is public and general throughout the kingdom, or private and special in some particular places. Of the first there are three: 1. The courts of common law and equity; 2. The ecclesiastical courts; 3. The courts of admiralty. There is a military court, called the court of Chivalry, formerly held before the Lord High Constable and Earl Marshal of England jointly: it had, by 13 Ric. II. c. 2. cognizance of contracts and other matters touching deeds of arms and war, as well out of the realm as in it, and from its sentence an appeal lies to the King in person; but it not being a court of record, of course not being able to fine and imprison, it is fallen into disuse; I shall therefore say no more of it, than that it gave relief to such of the nobility and gentry as thought themselves aggrieved in matters of honour, and kept up the distinction of degrees and quality, by adjusting their coats of arms and precedence. The interference of the latter was, and, if continued, would be of the greatest use in preserving the state of families and their various claims; but the want of such a family-preserver will be remedied in future, with respect to claims of peerage, by a standing order of the House of Lords, in May 1767, directing the heralds (who were formerly attendants of this court) to take exact



accounts, and preserve regular entries of all peers and peereſſes of England, and their reſpective deſcendants; and that an exact pedigree of each peer and his family ſhall, on the day of his firſt admiſſion, be delivered to the Houſe by Garter principal king at arms.

I. Firſt, then we are to ſpeak of the public courts of Common Law and Equity; and we will begin with the loweſt, the court of *pie poudre*, ſo called from *pied puldreaux*, which ſignifies, in old French, a pedlar, and denotes the court of ſuch petty chapmen as reſort to fairs and markets. It is a court of record incident to every fair and market, of which the ſteward of him who owns the toll of the fair or market is judge. This court has cognizance of all matters of contract that can poſſibly ariſe within the precinct of the fair or market, and the plaintiff muſt make oath that the cauſe of an action aroſe there. From this court a writ of error lies, in the nature of an appeal, to the courts at Weſtmiſter. It was inſtituted to do juſtice expeditiouſly among the variety of people that reſort to fairs and markets; ſo that here the injury muſt be done, complained of, heard and determined in one and the ſame day, unleſs the fair continues longer.

II. The next in conſequence, though not a court of record, is a court incident to every manor in the kingdom, called a *Court-baron*, and held by the ſteward within the ſaid manor. This court is of two natures; one, of which we formerly ſpoke, where the eſtates of copyholders are transferred, and other matters tranſacted relative to their tenures only; the other, as a court of Common Law, of which we are now to ſpeak. It is held before the freeholders, or barons, as they were originally called, who owe ſuit and ſervice to the manor, the ſteward being rather the regiſter than the judge.

It was formerly held every three weeks, and its principal buſineſs is to determine by writ of right, all diſputes relative to the right of lands within the manor. It may alſo take cognizance or hold plea of any perſonal actions, of debt, or damage, where the debt or damages do not amount to forty ſhillings. The proceedings, however, on a writ of right, may be removed by a precept from the ſheriff into the county court; and the proceedings in all other actions may be removed into the ſuperior courts, according to the nature of the ſuit. After judgment given, the matter may have a rehearing in the courts of Weſtmiſter.



III. The county court also is not a court of record, but may have cognizance of debt or damage under forty shillings. It is a court under the jurisdiction of the sheriff, and, by virtue of a special writ to the sheriff, it may also hold plea of many real actions, and of all personal actions to any amount. The freeholders of the county are the judges of this court, and the sheriff is the ministerial officer. From the supposed great conflux of freeholders to this court, all outlawries of absconding offenders are ordered to be there proclaimed; and all popular elections, as of knights of the shire, coroners, and verderers must be there held. By 2 Edw. VI. c. 25. no county court shall be adjourned longer than twenty-eight days, and it was formerly a court of great dignity: but as its proceedings now are removeable into the upper courts, the county courts have fallen into disuse.

IV. The Court of Common Pleas is one of the upper Common Law courts, of a more general nature than those we have mentioned, being calculated for redress, not in any one lordship or county only, but throughout the kingdom at large. It was established in Westminster Hall by King John, where it has continued ever since. The judges of this court are now four in number; one chief and three *puisnè* judges, created by the King's letters patent, who sit every day, in term time, to hear and determine all matters of law arising in civil causes, whether real or personal. These it takes cognizance of, as well originally, as upon removal from the inferior courts before mentioned; but an appeal lies from this court to the court of King's Bench.

V. The court of King's Bench, (so called because the King used to sit there in person) is the supreme court of Common Law in the kingdom. It has also four judges, a chief justice and three *puisnè* ones, who are by their office the chief conservators of the peace and sovereign coroners of the land. Though the King sat in this court, and is supposed to do so now, he was not empowered to determine any cause or motion, but by the mouth of his judges.

This court is impowered to be a check upon all inferior courts, and may either stop their progress, or remove their proceedings here. It has the superintendence of all civil corporations, commands magistrates and others to do what their duty requires; protects the liberty of the subject; and takes cognizance both of criminal and civil causes. It is also a court of appeal, into which may be removed all determi-

nations



nations of the court of Common Pleas, and of all inferior courts of record in the kingdom, and to which a writ of error lies from the court of King's Bench in Ireland. The determinations, however, even of this court may be removed by a writ of error into the House of Lords, or the court of Exchequer Chamber, according to the nature of the suit and the proceedings.

VI. The court of Exchequer is a court of law, and a court of equity too, which is the reason of its being here classed, though it is inferior to the courts of King's Bench and Common Pleas. It is a very ancient court of record, designed originally to recover the King's debts and duties. It consists now of two divisions: the receipt of the Exchequer, which manages the royal revenue, and of which we have nothing here to do; and the judicial part of it, which is a court of Equity and a court of Common Law.

The court of equity is held in the Exchequer Chamber, before the lord treasurer, the chancellor of the Exchequer, the chief baron, and three *puisnè* barons, who derive their names from being chosen out of the barons of the kingdom. Under the fiction of having connexions with the crown, all kinds of personal suits may be prosecuted in this court. So, on the equity side, any person may file a bill against another on the bare pretence of being the King's accomptant, which is never enquired into. An appeal from the equity side lies immediately to the House of Peers, but from the Common Law side it must be brought into the court of Exchequer Chamber, and from their determination an appeal lies to the House of Lords.

VII. The high court of Chancery is the most important of all the upper courts in matters of civil property and the lord chancellor, or lord keeper of the great seal (whose authority is declared by 5 Eliz. c. 18. to be exactly the same) is superior in precedence to any temporal peer, and is the first officer of state. He is a privy counsellor by office, and speaker of the House of Lords by custom. He is the general guardian of all minors, idiots, and lunatics, and has the superintendence of all charitable uses in the kingdom. He is visitor, in right of the King, of all hospitals and colleges founded by the crown, patron of all the crown livings under twenty pounds a year in the King's books, and has the appointment of all justices of the peace throughout the kingdom.

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The court of Chancery has two distinct tribunals, one being a court of Common Law, the other a court of Equity; the jurisdiction of the former is to repeal and cancel the King's letters patent, when made against law, or on false suppositions, (and from such cancelling, the Chancellor derives his name, *Cancellarius*, and from him the court is called the Court of Chancery) and to take cognizance of petitions, &c. when the King has been advised to do any act, or is put in possession of any lands or goods, in prejudice to the right of a subject. It takes cognizance also of all personal actions, where any officer or minister of the court is a party. It also holds plea of the tithes of forest land, where granted by the King, and claimed by a stranger against the grantee of the crown, and of executions on statutes or recognizances; but the chancellor, as he cannot summon a jury, cannot try any cause that requires a verdict, but must in such a case deliver the record into the court of King's Bench. And when judgment is given in Chancery upon demurrer, which is an appeal to the court, a writ of error, in the nature of an appeal, lies out of this common law part of Chancery to the court of King's Bench: but no such writ has been brought since 1572.

From this common law part, issue all original writs that pass under the great seal, all commissions of charitable uses, sewers, bankruptcy, lunacy, and the like. These writs relating to the people were formerly kept in a hamper, in *hanaperio*, and those relative to the crown, in a little bag: and from thence arises the appellations of the *hanaper* and *petty bag* offices, both which belong to the common law court of Chancery.

But the court of equity is become now the court of the greatest judicial consequence. An appeal, however, lies from it, as from other superior courts, to the House of Lords.

VIII. There is another court called the Court of Exchequer Chamber, which hath no original jurisdiction, but is merely a court of appeal to correct the errors of other courts. It consists of all the judges, and sometimes the lord chancellor; and into this court are sometimes adjourned from the other courts such causes as the judges find to be of great weight and difficulty, before any judgment is given upon them in the court below. But from all the branches of this court of Exchequer Chamber, a writ of error lies to

IX. The



IX. The House of Lords; which is the supreme court of judicature in the nation, and the *dernier resort*. It has, however, no original jurisdiction over causes, but is confined to appeals, and writs of error, to correct any mistake or injustice in the courts below.

X. But I must not omit to mention the courts of assize, and *Nisi prius*, which are a kind of auxiliary courts, composed of two or more commissioners, sent by the King's special commission, twice a year, all round the King's dominions, except in London and Middlesex, where *Nisi prius* courts are held in and after every term, by the chief or other judge of the several superior courts; and except the four northern counties, where the assizes are held only once a year. Their business is to try, by a jury of the respective counties, such causes as would otherwise come before the courts of Westminster; *nisi prius*, unless before the day prefixed, the judges of assize go into that part of the country. Hence the name *Nisi prius* Court. These judges sit also by virtue of a commission of the *peace*, explained at page 60, a commission of *Oyer and Terminer*, and a commission of *Gaol Delivery*, which will be treated of at another time. To prevent delay of business, in case of the absence or illness of the judge, two other commissioners, provided a serjeant be one, may proceed to execute the commission. Thus, for the ease of the subject, is justice brought home to every man's door; disputed facts are tried, if required, in the country by neighbours; but the law arising on those facts is determined by the judges above; and should these be mistaken there are courts to rectify mistakes: and, lastly, if the rigour of general rules should at any time bear hard upon individuals, courts of equity are open to relieve; reviewed, if need be, by a court of learned and honourable men, the prelates and nobles of the realm.

We will proceed now to Ecclesiastical Courts, and the courts of Admiralty, which are also of public and general jurisdiction: and first of the spiritual or ecclesiastical; and here also we will begin, with the most inferior.

I. The archdeacon's court is the lowest; held in his absence before a judge of his own appointing, called his Official. Its jurisdiction is sometimes in concurrence with the bishop's court of the diocese, and sometimes not: but an appeal lies to that of the bishop.

II. The bishop's court is held in the cathedral of each bishop's respective diocese, and is called the Consistory Court. The bishop's chancellor



or commissary is his judge, and from his sentence an appeal lies to the archbishop of the province.

III. The Court of Arches is the next superior, and is a court of appeal from the sentence of all inferior ecclesiastical courts in the province of Canterbury, the judge of which is called *Dean of the Arches*, being antiently held in the church of St. Mary-le-bow, (*Maria de Arcubus*). But from this court an appeal lies to the King in Chancery as head of the church, that is, to a court of delegates appointed under the King's great seal.

IV. The Court of Peculiars is a branch of the Court of Arches, and has jurisdiction over all those parishes, throughout the province of Canterbury, which, though in other dioceses, are subject only to the metropolitan. All ecclesiastical causes arising within these peculiar jurisdictions are cognizable in this court, from which an appeal also lies, as from the Court of Arches, to the King in Chancery.

V. The next in pre-eminence is the Prerogative Court, established for the trial of all causes relative to wills, where the deceased left property to the amount of five pounds in two dioceses; in which case, the probate of wills, as we have before noticed, belongs to the archbishop of the province, by way of prerogative. The judge here is appointed by the archbishop, from whom an appeal also lies to the King in Chancery. But,

VI. The great court of appeal, in all ecclesiastical matters, is the Court of Delegates, issuing out of Chancery, by virtue of the King's commission, to represent his person, and hear all appeals made to him. This commission is generally filled with lords spiritual and temporal, judges, and doctors of the Civil law. But in cases where the King himself is a party, the appeal lies, by 24 Hen. VIII. c. 12. to all the bishops assembled in the upper house of convocation. A commission of *review* is sometimes granted in extraordinary cases to revise the sentence of the Court of Delegates; but no subject has a right to demand this, being merely a matter of favour, and of course often denied. None of these ecclesiastical courts, it must be observed, are courts of record.

The Courts of Admiralty are such as have power to determine all injuries arising upon the seas, or in parts out of the reach of the Common Law. The Court of Admiralty here is held before the Lord High Admiral of England or his deputy. Its proceedings are agreeable



able to the method of the ecclesiastical courts, and of course held at the same place. It is no court of record; and an appeal from it lies to the Court of Delegates.

Appeals from the vice-admiralty courts in America, and our other settlements abroad, which are branches of this court, may be brought before the court of admiralty here, or before the King in council. But in case of vessels taken in time of war, in any part of the world, and condemned as prizes, the appeal lies to the privy council, who are commissioned under the great seal for this purpose: the question, whether lawful prize or not, being a question between subjects of different states, and belonging entirely to the law of nations.

Having hitherto treated of the general courts where jurisdiction is public and general, we will proceed to those which are private and special, instituted only to redress particular injuries. These are, 1. The forest courts: 2. Those of commissioners of sewers: 3. Courts of policies of assurance: 4. The Marshalsea: 5. The courts in the principality of Wales: 6. That of the duchy of Lancaster: 7. Those of the counties palatine: 8. The stannary courts in Devon and Cornwall: 9. The several courts in the city of London, with the courts of conscience: and, 10. The chancellor's courts in the two universities.

I. The forest courts were instituted for the government and preservation of the King's forests and deer, and were held before the verderers of the forest and the Chief Justice in Eyre; but since the Revolution they have, to the great advantage of the subject, fallen into total disuse; it will be unnecessary, therefore, to say any more of them.

II. The court of Commissioners of Sewers is a temporary tribunal, erected at the discretion and nomination of the lord chancellor, lord treasurer, and chief justices, pursuant to 23 Hen. VIII. c. 5. The jurisdiction of these commissioners is to overlook the repair of sea banks, and sea walls, the cleansing of rivers, public streams, ditches, conduits, and is confined to such district as the commission specifies. This court is a court of record, and may fine and imprison, and the commissioners may convict by jury, or on their own view, and may proceed to the removal of annoyances or the preservation of the sewers, according to the laws and customs of Romney Marsh (a large part of marsh land in Kent governed by certain antient laws) or at their own discretion.



discretion. They may also assess such rates upon the owners of land within their liberty or district as they shall judge right, and levy the same by distress on those who refuse to pay: nay, by 23 Hen. VIII. c. 5. they may seize and sell the refuser's land for that purpose; but their conduct is under the controul of the court of King's Bench.

III. The court of Policies of Assurance, may be appointed yearly by commission from the lord chancellor, to determine in a summary way all causes concerning policies of assurance in London, with appeal to the court of Chancery: but its jurisdiction being defective, no such commission has of late years issued: insurance causes being now determined by a verdict of merchants in Westminster Hall.

IV. The Marshalsea, or Palace Court, was erected to administer justice between the King's servants, but extends now to all manner of personal actions which shall arise between any parties within twelve miles of his Majesty's palace at Whitehall. It is held once a week in the Borough of Southwark before the steward of the household and knight-marshal, and the steward of the court, or his deputy: but a writ of error lies from it to the court of King's Bench. But if the cause is of great moment it is usually removed, with the custody of the defendant, by *Habeas corpus*, into the courts of King's Bench or Common Pleas.

V. Another species of private courts are those throughout the principality of Wales, erected at its reduction. A session being appointed to be held twice in every year in each county, by judges appointed by the King, in which cognizance is taken of real and personal actions, with the same form of process, and in as ample a manner as in the court of Common Pleas in Westminster; and writs of error lie from judgments therein, (they being courts of record) to the court of King's Bench at Westminster.

VI. There is a private court also held before the chancellor of the duchy of Lancaster or his deputy, relative to all matters of equity concerning lands held of the crown in right of the duchy of Lancaster: the proceedings in which are the same as on the equity side in the courts of Exchequer and Chancery: which courts may take cognizance of the same causes. This is not a court of record.

VII. There are also courts belonging to the counties palatine of Chester, Lancaster, Durham, and the royal franchise of Ely; having cognizance of matters both in law and equity. In all these, as  
in



in the principality of Wales, the King's ordinary writs issuing under the great seal out of Chancery are of no force: for this reason all writs whereon actions are founded, and have authority here, must be under the seal of the respective franchises. Chester and Lancaster are now united to the crown, but the other two are under the government of their respective bishops, by virtue of a commission from whom the judges of assize sit in Durham and Ely. The Cinque Ports have also franchises similar in many respects with the counties palatine, and have courts of their own; but a writ of error lies from the mayor and jurats of each port to the lord warden of the Cinque Ports in his court of Shepway, and from the court of Shepway to the King's Bench. A writ of error also lies from the courts palatine to the court of King's Bench. But though the King's ordinary writs have no force in these exempt jurisdictions, yet his prerogative writs, *viz.* writs of *Habeas corpus*, prohibition, *certiorari*, and *mandamus* take place here as in other parts of the kingdom; for there can be no privilege against the King.

VIII. Another species of particular courts are the Stannary Courts of Devon and Cornwall, instituted for the administration of justice among the tinners. These are courts of record held before the lord warden and his substitutes in virtue of a privilege granted to the workers in the tin mines, that they shall not be sued in any courts but their own; excepting in causes of land, life, and member. The appeal here lies from the steward of the court, to the under-warden; from him to the lord warden, and thence to the privy council of the prince of Wales as duke of Cornwall, and from thence to the King himself.

IX. The several courts within the city of London, and other cities, boroughs, and corporations, are, of the same kind, private and limited. The chief in the city of London are the sheriffs courts; from which a writ of error lies to the court of hustings, before the mayor, recorder, and sheriffs; thence to justices appointed by the King's commission, and thence by writ of error to the House of Lords. Courts of conscience also, may be considered under this head, which are courts for the recovery of debts under forty shillings, established in many trading towns. Here the cause is examined before commissioners in a summary way, by the oath of the parties, or other witnesses, and judgment given according to equity and good conscience.

In



In the city of London, the commissioners are two aldermen and four commoners, who sit twice a week; but in other towns they are respectable housekeepers; and in the county of Middlesex, it is enacted by 23 Geo. II. c. 33. That a special county court shall be held by the county clerk, at least once a month in every hundred throughout the county. That twelve freeholders of that hundred, qualified to serve on juries, and struck by the sheriff, shall be summoned to appear at such court by rotation; so as none shall be summoned oftener than once a year. That in all causes, not exceeding the value of forty shillings, the county clerk and twelve suitors shall proceed in a summary way, examining the parties and witnesses on oath, without the formal process antiently used; and shall make such order therein as they shall judge agreeable to conscience. That no complaints shall be removed out of this court by any process whatsoever; but the determination herein shall be final. That if any action be brought in any of the superior courts against a person resident in Middlesex for debt or contract, upon trial whereof the jury shall find less than forty shillings damages, the plaintiff shall recover no costs, but shall pay the defendant double costs; unless under some special circumstances to be certified by the judge who tried it. And a table of very moderate fees are set down in the act, which are not to be exceeded.

X. The last species of private courts are those of the vice-chancellors in the two universities, Oxford and Cambridge. Here they are at liberty to try and determine, both according to the Common Law or their own customs, as they please, all civil actions and suits whatsoever, when a scholar, or one of their own body is one of the parties, excepting in such cases where the right of freehold is concerned. At Oxford the judge of the court is the vice-chancellor, his deputy, or assessor. From his sentence an appeal lies to delegates appointed by the congregation, from thence to other delegates of the house of convocation; and if they all three concur in the same sentence, it is final; if not, the last appeal is to judges delegates appointed by the crown under the great seal in Chancery.

Such are the special courts of most note instituted for the local redress of private wrongs: but all these private jurisdictions are ever strictly restrained to the express letter of their privileges. They cannot exceed them in the least.

Having



Having now described the nature of the several species of courts erected in this kingdom for the redress of private wrongs, we are next to point out in which of these courts a man is to apply for redress, in every possible injury that can be offered either to his person or his property.

Of what wrongs the several species of private limited courts have cognizance, we have already seen; it remains only to shew to which of the public general courts we are to apply in civil injuries; or, which is the same thing, to consider what actions may be brought, or what injuries remedied in the Ecclesiastical courts; what in the courts of Admiralty; and what in the courts of Common Law.

I. The private wrongs cognizable by the ecclesiastical courts, are of three kinds; *viz.* money matters, marriages, and wills.

1. Of the first are such as relate to tithes and ecclesiastical dues. The ecclesiastical courts have no power to try the *right* of tithes, unless between spiritual persons; between clergymen and laymen, they can only compel the payment of them where the right is not disputed. By 2 & 3 Edw. VI. c. 13. if any person shall carry off his predial tithes (*viz.* of corn, hay, or the like) before the tenth part is duly set forth, or agreement is made with the proprietor, or shall willingly withdraw his tithes of the same, or shall stop or hinder the proprietor of the tithes, or his deputy, from viewing or carrying them away, such offender shall pay double the value of the tithes with costs, to be recovered before the ecclesiastical judge. But a more summary method is given, by 7 & 8 W. III. c. 6. of recovering small tithes under the value of forty shillings; that is, by complaint to two justices of the peace; and the same remedy is extended to all tithes withheld by Quakers, under the value of ten pounds.

The spiritual courts have also cognizance of non-payment of other ecclesiastical dues to the clergy, as pensions, mortuaries, compositions, offerings, and surplice-fees. But all offerings not exceeding the value of forty shillings, may be recovered before two justices of the peace. But, in an application to the spiritual courts, care must be taken that they are not imaginary dues, or the temporal courts will issue out a prohibition to stop proceedings. A licensed curate, whose salary is appointed by the bishop, if not paid, may sue for it in the spiritual court; but if he be not licensed, and his salary is by agreement with the rector, he must seek his remedy at Common Law.



The Ecclesiastical Courts have also cognizance of spoliations, dilapidations, and neglect of repairing the church, and things belonging to it, or for non-payment of a churchwarden's rate made for the use of the church or church-yard.

Spoliation is an injury done by one incumbent to another, by taking the profits of his living under a pretended right: but if the right of advowson comes in question upon this business, the matter must be tried in the temporal courts, unless the tithes, &c. sued for are less than a fourth part of the value of the living.

Dilapidations are pulling down the chancel, parsonage house, or other building belonging to it, or suffering them to decay. In which case, the successor may bring an action for damages against his predecessor, if living, or, if dead, his executors. It is also said to be good cause of deprivation, where a bishop, rector, vicar, or other clerical person pulls down the building, or cuts down the timber growing on the patrimony of the church, unless for repairs. And, by 13 Eliz. c. 10. If any spiritual person makes over or alienates his goods with intent to defraud his successors of their remedy for dilapidations, the successor shall have such remedy against the alienee, (or person to whom they are made over) in the ecclesiastical court, as if he were the executor of his predecessor: and all money recovered for dilapidations shall, within two years, be employed upon the buildings, in respect whereof it was recovered, on penalty of forfeiting double the value to the crown.

2. Matrimonial causes are also the province of the Spiritual Courts to try. As in cases of jactitation, where one party boasts or gives out that he or she is married to the other. On this ground the injured party may libel the other in the spiritual court: and unless the defendant proves the marriage, he or she is enjoined perpetual silence on that head. The spiritual court will also compel a husband or wife who separate from each without sufficient reason to live together again, if either of the parties desire it. Separations and divorces are also within the jurisdiction of this court. Where it is improper, from any cause arising after marriage, such as intolerable cruelty, adultery, or perpetual disease, and the like, that the parties should not live any longer together; this court will decree a separation *a mensâ et thoro*, from bed and board; but if the cause existed before marriage, and was such as rendered the marriage void from the first, as being too near of kin, corporal imbecility, or the like, it will pronounce



nounce the marriage totally void. In separation *a mensâ et thoro*, an allowance, called alimony, is generally decreed to the wife for her maintenance, suitable to her situation in life, which if the husband does not pay, this court, on an application, will compel him; but no alimony will be allowed in case of divorce for adultery on her part.

3. Causes respecting wills are also heard in this court; by an express privilege originally granted to the clergy. This jurisdiction is chiefly exercised in the bishops courts, with appeal to the arches and court of delegates; but when a *caveat* is entered against proving the will, or granting administration, and a suit thereupon follows to try the matter, it is brought into the spiritual court: and this court will also compel executors to pay legacies, where they are withheld. The course of proceeding here, is, first, by citation, summoning the party to appear; then by libel or allegation, setting forth the complainant's ground of complaint; the defendant then answers upon oath, and if he denies or extenuates the charge, witnesses are examined to prove it, and their depositions taken down in writing. The defendant may also in his turn call for the plaintiff's answer on oath, to his allegation, and may proceed to prove what he (the defendant) sets forth: but by 13 Car. II. c. 12. no person can be compelled to confess or accuse himself of any thing criminal, whereby he may be liable to censure or punishment. When all the pleadings and proofs are concluded, they are referred to a single judge, who, after hearing advocates on both sides, passes sentence at his own discretion, from which there generally lies an appeal, as before pointed out: provided such appeal be made within fifteen days, if not, the sentence is final. But the spiritual court has no way of enforcing its sentences but by the less and the greater excommunication. The less exclude the party merely from partaking of the sacraments; the greater from the company of all christians. If the judge of any spiritual court excommunicates a man for a cause, of which he has not legally the cognizance, the party may bring an action against him at Common Law, and he is liable to be indicted at the suit of the King.

An excommunicated man cannot serve on juries, be witness in any court, nor bring an action either real or personal to recover lands or money due to him. And, if within forty days after the sentence has



been published in the church, the offender does not submit and abide by the sentence of the court, the bishop may certify such contempt to the King in Chancery, on which a writ issues thereout to the sheriff to take the offender and imprison him in the county gaol, till he is reconciled to the church.

In cases of tithes, the 27th Hen. VIII. c. 20. and 32d Hen. VIII. c. 7. enact, That on complaint of any contempt or misbehaviour to the ecclesiastical judge by the defendant in any suit for tithes, any privy counsellor or any two justices of the peace may commit the party to prison without bail, till he gives sufficient security to pay due obedience to the process and sentence of the court.

II. Injuries cognizable by the courts of admiralty are such as are triable by the Common Law, but committed on the high seas, out of the reach of our ordinary courts of justice. Even if part of any contract arises on the sea, and part on land, the admiralty court has no jurisdiction over it; except in cases of seamen's wages, and prizes in time of war.

The first process in these courts is often by arrest of the defendant's person; and in which case they take bail, but in default may imprison both them and their principal. They may also fine and imprison for a contempt in the face of the court, grounded on immemorial usage; but nevertheless they are not courts of record.

III. With respect to the courts of Common Law, all possible injuries are here cognizable, that do not fall within the jurisdiction of the Spiritual Courts or courts of Admiralty. These will take up much of our attention, and shall be the subject of the next two chapters; before I enter on them, therefore, I will just speak of two kinds of injuries that should be mentioned here; these are, when justice is delayed by an inferior court that has cognizance of the cause; or when such inferior court takes upon it to decide where it has no cognizance.

I. The first of these injuries, in cases of delay of judgment, is remedied by a writ of *mandamus*, issuing from Chancery, commanding them in the King's name to proceed to judgment, when, if the judges of the inferior court neglect or refuse, they are punishable by writ of attachment in the court of King's Bench or Common Pleas; and may be taken into custody.

A writ



A writ of *mandamus*, in general, is a command of the King, from the court of King's Bench, and directed to any person, corporation, or inferior court of judicature, requiring them to do some particular thing belonging to their office, which the court of King's Bench has previously determined to be consonant to right and justice; such as to compel the admission, or restoration of the applicant, to any office or franchise of a public nature, whether spiritual or temporal; to academical degrees; to the use of a meeting-house, &c. to compel the production, inspection, or delivery of public books and papers; the surrender of the *regalia* of a corporation; to oblige corporate bodies to affix their common seal; to compel the holding of a court, and the like. A writ of *mandamus* from the King's Bench will also compel judges of inferior courts, to do speedy justice where the same is delayed; as to oblige the courts of London to enter up judgment; the Spiritual Courts to grant administration, and the like. To procure such a writ, the party injured makes oath of his own right, and the denial of justice below, upon this the court directs the party complained of to shew cause why a writ of *mandamus* should not issue; if no cause be shewn, the writ issues; to which an answer must be made at a certain day. If an insufficient reason be returned, a *peremptory mandamus* is issued, to which no other return or answer will be admitted, but a certificate of perfect obedience. If no answer or return be made, the judge may be taken into custody for contempt; but if at first he returns a sufficient cause, whether true or false, the court will not try the truth of the facts, but the matter rests here. In the case however of a false return, the injured party may have an action against him for it, and shall recover damages equivalent to the injury ascertained, and a *peremptory mandamus* to the defendant to do his duty.

2. The other injury, that of a court's taking up a cause which it has no cognizance of, is remedied by a writ of *prohibition* issuing from the courts of Chancery, King's Bench, or Common Pleas, commanding the judge and parties of a suit in any inferior court to cease from prosecuting it: and if either the judge or the party shall proceed after such prohibition, an attachment may be had against them, that is, they may be taken into custody, and punished for the contempt at the discretion of the court that awarded it, and an action will lie against them to give the injured party damages.



## C H A P. III.

OF REDRESS BY APPLICATION TO COURTS, BETWEEN  
SUBJECT AND SUBJECT.

WE now proceed to the several injuries cognizable by the courts of Common Law, and the remedies applicable to each injury ; and first we will consider those injuries committed between subject and subject, which the King, as the fountain of justice, is bound to redress ; this done, we will take into consideration those injuries that may occur between the crown and a subject.

All injuries, whether they affect a man's person or property, are of two kinds ; the one attended with force or violence, as batteries, or false imprisonment ; the other, without force or violence, as slander or breach of contract ; and as in treating of *rights* we divided them into those of persons and things, so in treating of injuries or *wrongs*, we will divide them into such as affect the *rights of persons*, and the *rights of things*, or property.

I. And first as to those wrongs which affect the rights of persons, the personal security of individuals ; they are either injuries against,  
1. Their lives ; 2. Their limbs, or their bodies ; 3. Their health ; or, 4. Their reputations.

1. Injuries affecting the life of man we shall treat of in the fourth book.

2. Those affecting the limbs or bodies may be committed, 1. By threats or menaces of bodily harm, through fear of which a man is interrupted in his business ; for a menace, without such interruption or inconvenience, is not actionable. Where they join, pecuniary damages may be recovered by an action of trespass, *vi et armis*. 2. By assault, which is an attempt or offer to beat another, though without touching him ; as lifting up a cane or the arm in a threatening manner ; or striking at a man, but missing him. Damages may be recovered here also by an action of trespass *vi et armis*. 3. By battery, which is the unlawful beating of another. Beating is in some cases lawful, as in moderate correction of children, scholars, and apprentices, or on the principle of self-defence, or defence of my goods  
or



or possessions, where a man endeavours to deprive me of them. A churchwarden or beadle may also justify laying hands on another, to turn him out of church and prevent his disturbing the congregation; so may a man turn another out of his house. *Nels.* Assault. But for *unlawful* beating, a jury will give adequate damages on an action on trespass as before. 4. By wounding. 5. By mayhem or maiming, which is depriving a man of those members proper for his defence; these are allowed to be not only legs and arms, but a finger, an eye, a fore tooth, and some others. The same action will lie to recover damages for this injury as for those before-mentioned. By 37 Hen. VIII. c. 6. if the ear be cut off, treble damages are given, though this be not *mayhem* at Common Law. For the injuries of assault, battery, wounding, and *mayhem*, an indictment may be brought as well as an action, or both together; one at the suit of the crown for breach of the peace, the other at the suit of the injured party for damages.

4. An action of trespass upon the case (which is the general action or universal remedy for all personal injuries done without violence) will also lie, where a man's health is injured by the unfair practices of another; as by selling him bad provisions or wine; by the exercise of a noisome trade, which corrupts the air in his neighbourhood; or by the neglect or unskilfulness of his physician, surgeon, or apothecary.

5. A similar action will also lie, and a jury will give adequate damages for injuries affecting a man's good name; such as malicious, scandalous, and slanderous words tending to his damage; or any false tale that may endanger him in law, as to say that he is perjured, or hath poisoned another; or which may exclude him from society, as to say, he has an infectious disease; or to hurt him in his profession, as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave. Defamatory words spoken of a peer, a judge, or other great officer of the realm, are accounted still more atrocious, and are called *scandalum magnatum*. Thus words that would not be actionable, if spoken of a common person, are highly so, if spoken of these. Words also tending to scandalize a magistrate, or a person in a public trust, are considered as more highly injurious, than when spoken of a private man. If the offender be prosecuted on behalf of the crown,  
he



he may be imprisoned for his slander. And it is now held that for scandalous words of the several kinds before-mentioned, an action on the case may be had without proving any particular damage; but with regard to words that do not, upon the face of them, import injury to the person defamed, it is necessary that he should prove he has sustained thereby some particular damage. For mere scurrility, as rogue or rascal, without any injurious effect, will not support an action. Calling a man heretic or adulterer are cognizable only in the Spiritual Courts, unless temporal damages can be proved, in which case an action will lie for these. Defamatory words must also be *maliciously* spoken; for if said in a friendly manner, as by way of advice or concern, they are not actionable; nor are any words so, as was observed once before, made use of in legal proceedings, provided they are not foreign to the subject. If the defendant also be able to prove his words, no action will lie, even though the defamed person can shew he has received injury thereby. Irony is as properly a malicious defamation, as direct terms; so is defamatory writing, abusing persons by initials, if understood by a jury. 1 *Haw.* 194.

A man's reputation may be hurt by printed or written libels, pictures, signs, and the like; which set him in an odious or ridiculous light. With respect to libels, there are two remedies, one by indictment, another by action, and that where the party is indicted, whether the matter be true or false; of course on an indictment for a libel the defendant is not allowed to alledge the truth by way of justification; but if an action be brought, which is to give the injured party damages, the defendant may, as for words *spoken*, prove the truth of the facts, and shew that the plaintiff has received no injury. If the party be defamed by pictures or signs, it is necessary to bring home the allusion, and prove that some damage has accrued in consequence.

Sending a gentleman a wooden gun, or a licence, to keep a public house, are libels, for which informations have been granted. *Str.* 422. and with respect to libels, it matters not whether the party be alive or dead. 5 *Co.* 125. The publisher of a written libel is equally guilty with the author, though he knows not the contents of the paper, and if he who reads it or has heard it read maliciously, reads it or repeats in the presence of others, or lends it or shews it to another,



ther, he is deemed a publisher; so is one who copies it, unless it be to deliver it to a magistrate. 1 *Haw.* 195. Even finding a libel on a bookseller's shelf, is a publication of it by the bookseller, though it be put upon that shelf by a servant, without his master's knowledge. *Seff. c. v. 1. p. 33. K. and Dodd.* 10 Geo. I. but then it must be such a libel as is publicly known; 1 *Haw.* 196. otherwise having it in one's custody is no publication; no more than the reading of it in the presence of another, not knowing it before to have been a libel. 1 *Haw.* 195. He who writes a libel dictated by another is guilty of making it; for though a man speaks libellous words, it is not a libel, unless the words be put in writing. 2 *Salk.* 419. 1 *Haw.* 195.

There is still another mode of injuring a man's character, which is by preferring malicious indictments or prosecutions against him. In this however the law has given a very adequate remedy in damages, either by an action of conspiracy, which can be brought if there are two persons concerned, or if only one, by a special action on the case for a false and malicious prosecution. To carry on an action of conspiracy, the plaintiff must obtain from the judges a copy of the record of his indictment and acquittal, which in prosecutions for felony is seldom granted, where there was the least probable cause to found a prosecution on; as it would be a great discouragement to public justice, if prosecutors were liable to be sued, whenever their indictments miscarried. But a person who has been indicted, and where the bill has not been found by the grand jury, may bring an action against the prosecutor for a malicious prosecution. Any probable cause, however, for preferring an indictment, will justify the defendant. As one person cannot be guilty of a conspiracy, it follows, if all the conspirators are acquitted but one, that one must be acquitted of course. 1 *Haw.* 192.

The second injury that affects the rights of persons is false imprisonment; for which the law has not only decreed a punishment, as for public crimes, but has also given reparation to the party aggrieved.

Every confinement of the person is deemed an imprisonment, whether it be in a common prison or a private house, or even by forcibly detaining one in the street. In short, it is illegal detention, whether it arises from some error in legal process, or some defect in issuing warrants,



warrants, or executing them; as arresting by mistake a wrong person; serving a writ on a Sunday, or in a privileged place, as, the verge of the court. The remedy for this is removing the injury, and making satisfaction for it.

The first is by writ directed to the sheriff, commanding him to take bail for the prisoner's appearance; but the most usual mode is by a writ of *habeas corpus*; a writ grantable of common right, without any motion in court. But to prevent the surreptitious discharge of prisoners, it is enacted, by 1 & 2 P. & M. c. 13. that no *habeas corpus* shall issue to remove any prisoner out of any gaol, unless signed by some judge of the court out of which it is awarded: and to avoid the removal of frivolous causes, it is further enacted, 21 Jac. I. c. 23. That where the judge, of an inferior court of record, is a barrister of three years standing, no cause shall be removed from thence by *habeas corpus* or any other writ, after issue or demurrer deliberately joined; that no cause, if once sent back to the inferior court, shall ever afterwards be removed; and that no cause shall be removed at all, if the debt or damages laid in the declaration, does not amount to the sum of five pounds.

But the great *habeas corpus* writ in all illegal confinements is that directed to the person detaining another, and demanding him to produce the prisoner, with the day and cause of his being taken and detained. This writ may be obtained, not only from the upper courts in term time, but from any of the judges during the vacation. In the King's Bench or Common Pleas, it is applied for by motion to the court, and in every warrant for commitment, the cause of commitment is specified, that the court may, on such motion, examine into the validity. The *habeas corpus* act, 31 Car. II. c. 2. enacts, That the writ shall be returned, and the prisoner brought up before the court, within a limited time, according to the distance; not exceeding in any case twenty days. That on complaint and request in writing, or on behalf of any person committed and charged with any crime (unless he be committed for treason or felony expressed in the warrant, or unless he is convicted and charged in execution by legal process) the Lord Chancellor, or any of the twelve judges in vacation, upon viewing the copy of the warrant, or affidavit that a copy is denied, shall, unless the party has neglected for two terms to apply to any court for his enlargement, award a *habeas corpus* for such prisoner,



soner, returnable immediately before himself, or any other of the judges, and upon the return made, shall discharge the party on bail, if bailable. That officers and keepers neglecting to make due returns, or not delivering to the prisoner, or his agent, within six hours after demand, a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another, without sufficient reason or authority (expressed in the act) shall, for the first offence, forfeit one hundred pounds, and for the second, two hundred pounds to the party grieved, and be disabled to hold his office. That no person, once delivered by *habeas corpus*, shall be recommitted for the same offence on penalty of five hundred pounds. That every person committed for treason or felony, shall, if he requires it, the first week of the next term, or the first day of the next session of *oyer and terminer*, be indicted in that term or session, or else admitted to bail, unless the King's witnesses cannot be produced at that time: and, if acquitted, or, if not indicted and tried in the second term or session, he shall be delivered from his imprisonment for such imputed offence: but that no person, after the assizes shall be opened for the county in which he is detained, shall be removed by *habeas corpus*, till after the assizes are ended; but shall be left to the justice of the judge of assize. That any such prisoner may move for and obtain his *habeas corpus*, as well out of the Chancery, as out of the King's Bench or Common Pleas; and the Lord Chancellor or judges denying the same, shall forfeit severally to the party grieved the sum of five hundred pounds. That this writ of *habeas corpus* shall run into the counties palatine, Cinque Ports, and other privileged places, and the islands of Jersey and Guernsey. That no inhabitant of England, (except convicts to be transported, or persons having committed some capital offence in the place to which they are sent) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any place beyond the seas, within or without the King's dominions: on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party grieved, a sum not less than five hundred pounds, to be recovered with treble costs, shall be disabled to bear any office of trust or profit; shall incur the penalty of *præmunire*; and shall be incapable of the King's pardon.

The remedy for false imprisonment, is by an action for the same, accompanied by a charge of assault and battery, wherein the party grieved shall recover damages, and the offender is, as for all other in-



juries committed with force, liable to pay a fine to the King for the breach of the peace.

But personal injuries may be sustained under the four following relations: husband, parent, guardian, and master.

1. Taking away a man's wife, criminal conversation with her, and beating or otherwise ill using her, are three atrocious injuries to a husband.

Taking a man's wife away, called abduction, whether by violence, fraud, or persuasion, is punishable by an action of ravishment, at Common Law, wherein the husband shall recover damages for the injury; and by Westm. 1. 3 Edw. I. c. 13. the offender shall be imprisoned two years, and be fined at the pleasure of the King, that is, of the court. The wife's consent to go, will not mitigate the offence; for, in law she has no power to consent: both the King and the husband may have their action; and the husband is also intitled to recover damages in an action on the case, against such as persuade and entice the wife to live separate from him without a sufficient cause.

Adultery or criminal conversation with a man's wife, though, as a public crime, it is left to the spiritual courts; yet as a civil injury, the husband may bring an action of trespass *vi et armis* against the adulterer; wherein the damages given are usually large, according to the rank and fortune of the plaintiff and defendant, and the circumstances of the case.

For beating or otherwise ill using a man's wife, if it be a common assault, battery, or imprisonment; the husband and wife may, in their joint names, recover damages, by an action of trespass *vi et armis*. If the ill treatment be very gross, so as to lay the wife up, the law gives the husband a separate action of trespass, in which he shall recover damages.

2. Taking away a man's children is an injury done him, which he may remedy by a writ of ravishment, in the same manner as a husband may the abduction of his wife.

3. Of a similar kind is the injury done to a guardian by taking away his ward, and for which he may recover damages for the benefit of the ward, by a writ of ravishment; but a more summary method of redressing all complaints relative to wards and guardians, is by an application



application to the court of Chancery, which is the supreme guardian of all the infants in the kingdom.

4. As a master there are two kinds of injuries a man may sustain, the one by retaining his hired servant before his time be expired; the other by beating or confining him, so that he is not able to work. The first is not only an ungentleman-like act, but an illegal one; and the master may not only recover damage by an action on the case, against the person that entices him away; but he may have an action against the servant for non-performance of his agreement. If the new master, however, was unacquainted with the servant's contract, no action will lie against him, unless he refuses to restore the servant upon demand. The other injury, that of beating, confining, or disabling a servant hangs on the same principle; the labour of the servant being the property of the master. In this case, not only the master may recover damages on an action of trespass *vi et armis*, but the servant, as an individual, may bring an action of battery or imprisonment, and recover damages likewise.

We may here observe, that redress is only pointed out to one party, the superior, *viz.* the husband, father, &c. but the wife or child, if the husband or parent be slain, may prosecute the criminal by appeal, which is in the nature of a civil satisfaction, and of which more will be said in the next book.

II. Our next enquiry is the injuries done to a man in his personal property, and that whether the property be in possession or not.

1. If it be in his possession it is an injury to deprive him of it, or damage it; and in depriving a man of his property two things are to be considered, whether it be unjustly taken from him, or illegally withheld, when lawfully taken.

In unjust taking, the person injured may recover the goods so taken, and damages for loss sustained by such invasion, which is effected by replevin and action of detinue. Where goods are taken by distress, an action of replevin is the regular way of contesting the validity of the act; (what replevin is has been shewn before).

So other remedies for unjust taking of a man's goods, are recovering only a satisfaction in damages. As where one takes the goods of another out of his actual possession, without a lawful title, which may be done without felony. For example, where a servant takes his master's horse, without his knowledge, and brings him home again;



where a neighbour takes another's plough left in the field, and uses it in his own land, and then returns it; for the felonious intent of stealing must appear to deem it an act of felony: I say such taking out of possession is only a transgression, for which an action of trespass will lie, and the plaintiff shall recover damages; or the party, if the thing be taken without force, may recover damages by an action of trover and conversion.

A man may also be injured in an unjust detainer of his goods, though the original taking might be lawful. As where one man distrains another's cattle for breaking into his grounds, and before they are impounded tenders sufficient amends. If he detains them afterwards, the owner may have an action of replevin to recover, and will have damages allowed him for the detainer. Or if one man lends another his waggon, and he refuses to return it, the injury consists in the detaining, and the best method to recover possession is by an action of trover and conversion. Any man may take the goods of another if he finds them; but no finder is allowed to acquire a property therein, unless the owner be for ever unknown; if he converts them therefore to his own use, and refuses to restore them, the owner may recover adequate damages on an action of conversion. If he wishes to recover the thing itself, it must be by an action of detinue or replevin.

As to damages that may be done to things while in the owner's possession, such as hunting his deer, shooting his dogs, laming his horses, or the like; the redress is, by action of trespass, *vi et armis*, where the injurious act is accompanied with any degree of force; or by special action on the case, where the injury is done without force. In both which cases, the plaintiff shall recover damages in proportion to the injury he has received; and it is not material whether the injury be done by the defendant or his servants by his direction, as in this case the master is responsible for the conduct of his servants. Indeed actions will lie against them both. And if a man keeps a dog or other animal used to do mischief, if the owner knows of such evil habit, he must answer for the consequences.

2. We proceed now to injuries done to personal rights not in possession, but such as arise from express or implied contracts.

Express contracts include debts, covenants, and promises, which may be recovered or enforced by action on the case, or a writ of covenant.



nant. With respect to promises, which are verbal covenants, it may be necessary to observe, that it is enacted, by 29 Car. II. c. 3. That in the five following cases, no verbal promise shall be sufficient to ground an action on, but at the least some *memorandum* of it shall be made in writing and signed by the party to be charged therewith.

1. Where an executor or administrator promises to answer damages out of his own estate. 2. Where a man undertakes to answer for the debt, default, or miscarriage of another. 3. Where any agreement is made upon consideration of marriage. 4. Where any contract or sale is made of lands, tenements, or hereditaments, or any interest therein. And, 5. where there is any agreement that is not to be performed within a year from the making thereof.

Implied contracts include those sums charged on a man by the sentence of the law, which he is bound to pay. So that if a man hath once obtained a judgment against another for a certain sum, and neglects to take out execution thereon, he may afterwards bring an action of debt on this judgment: on this principle it is, that a man is obliged to pay any forfeitures imposed by the bye-laws or private ordinances of a corporation to which he belongs, or any fines set in a court-leet, or court-baron; or any penalties inflicted for the breach of positive laws; or in short, in any thing he has engaged to perform, as far as duty or justice requires. As if I employ a person to do any business for me, the law implies that I engaged to pay him as his labour deserved: and if I neglect to pay him, he has a remedy, by action on the case. Where one has received money belonging to another, without any valuable consideration given on the receiver's part, the law implies that the person so receiving engaged to account for it to the true owner, and if he unjustly detains it, an action will lie against him: so will it against a man to whom money is paid through mistake; or on a consideration which happens to fail, or through imposition, extortion, or oppression, or indeed where any undue advantage is taken of the plaintiff's situation. And where a person has expended any money for the use of another, the law supposes a promise of repayment, and an action will lie to enforce it. So will it for the balance of an account: though the best way to enforce a settling of accounts is by filing a bill in equity, which obliges the defendant to give in his account upon oath. The law also implies, that every one who undertakes an office, contracts with his employer to perform



perform it properly, and if not done, damages may be recovered by the party grieved, by bringing a special action on the case; for example, if a sheriff does not execute a writ sent him, or wilfully makes a false return; if a sheriff or gaoler suffers a prisoner under arrest to escape; if a counsellor or attorney betrays the cause of their client; if an inn-keeper does not secure his guests goods in his inn; if a common carrier does not deliver the goods he takes, according to the directions; if a farrier lames a horse in shoeing him; if a taylor or other workman does not execute his business in a workman-like manner; in all these cases an action will lie, and damages may be recovered for a breach of their *general* undertaking: but if I employ a person in any of these concerns, whose common business it is not; I cannot recover damages, unless I prove a *special* agreement; so, against an inn-keeper or other victualler that hangs out a sign, and opens his house, for travellers, will an action lie, if he refuses admittance to any one at proper times. If any one cheats me with false dice or cards, by false weights or measures, or by selling me one commodity for another, an action on the case lies against him for damages; for the law implies that all transactions are to be fair and honest. In contracts likewise for sales, it is ever understood that the seller warrants the commodity he sells to be his own, if it proves otherwise, an action for damages will lie for the deceit. In contracts for provisions, it is always implied that they are wholesome; and if the seller warrants the commodity on the sale to be good, if it proves otherwise, the law will oblige him to make the buyer a compensation. If the warrant be not made at the time of the sale, but after, the warrant is void; and though a seller does not warrant the goods he sells, yet if he knew them to be bad, or took measures to disguise them, or if they are in any shape different from what he represents them, the seller is answerable for their goodness. A general warranty will not however guard against visible defects: for example, a man's warranting a horse to be perfect, that has not a tail nor an ear, will not make him responsible, unless the buyer was blind; but warranting a horse to be sound, that is blind, will subject the seller to damages, as the blindness of a horse every one is not acquainted with: and if cloth is warranted to be of such a length, and it proves otherwise, an action will lie for damages, as it would be troublesome, and injurious perhaps to the cloth, to unroll it.

But



But besides a special action on the case, a man may recover damages on an action of deceit, where there is fraud in the transaction, as where one man does any thing in the name of another, by which he is deceived or injured; as where an attorney brings an action in the name of another, and then suffers a nonsuit, whereby the plaintiff becomes liable to costs; or where one suffers a fraudulent recovery of lands or chattels to the prejudice of him that hath right.

In short, the non-performance of contracts, express or implied, includes every possible injury to personal property not in possession: we come next to consider injuries to real property, or affecting real rights. These are six; 1. Ouster; 2. Trespass; 3. Nuisance; 4. Waste; 5. Subtraction; and, 6. Disturbance.

I. Ouster of a freehold, is a dispossessing the right owner in any way. The remedy for which is an action at law, according to the circumstances of the case, which, if it be by writ of right, it must be sued out within sixty years of the cause of action; if by writ of entry, or any other possessory action, fifty years; or if in an action grounded on one's own possession, such possession must have been within thirty years; in which cases the owner may recover the possession and damages for the injury sustained. But to prevent fraudulent recoveries of possession, by collusion with the tenant of the land, all tenants are obliged by 11 Geo. II. c. 19. to give notice to their landlords, when served with any declaration in ejectment, on pain of forfeiting three years rent.

With respect to leases, where tenants are in arrear, it is enacted, by 4 Geo. II. c. 28. That every landlord, who hath by his lease a right of re-entry in case of non-payment of rent, when half a year's rent is due, and no sufficient distress is to be had, may serve a declaration in ejectment on his tenant, or fix the same on some notorious part of the premises, which shall be valid, without any formal re-entry or previous demand of rent. And a recovery in such ejectment shall be final and conclusive, both in law and equity, unless the rent and all costs be paid or tendered within six calendar months afterwards.

II. Trespass, in the sense in which we are now to consider it, is an entry on another man's ground without a lawful authority, and doing some damage, though it be merely the treading down the grass; for which



which an action of trespass will lie, and a jury will give adequate satisfaction. But no man can bring such an action that is not in possession of the ground. And therefore an heir before entry cannot support this action; yet a person put out of possession may bring it against the person that puts him out, for that very act; though he cannot for any future trespass, till he is again in possession, by re-entry; and then he may, for the intermediate damage done. By 6 Ann, c. 18. if a guardian or trustee for any infant, a husband seized in right of his wife, or a person having any estate or interest determinable upon a life or lives, shall, after the determination of their respective interest, hold over and continue in possession of the lands or tenements, they shall be adjudged to be trespassers; and in case, after the determination of any term of life, lives, or years, any person shall wilfully hold over the same, the lessor is entitled to recover by action of debt, either at the rate of double the annual value of the premises, in case he himself hath demanded and given notice in writing, to deliver the possession; or else double the usual rent, in case the notice of quitting proceeds from any tenant having power to determine his lease, and he afterwards neglects to carry it into due execution.

A man is responsible also for the trespass of his cattle, whether they stray or break into the grounds of another; in which case the party grieved may either distrein them damage-feasant, till the owner shall make him satisfaction; or he may recover damages by an action of trespass, *vi et armis*, for the law always supposes force to accompany intrusion.

In some cases entry on another's land may be justified; as when a man comes to pay or demand money, or to execute legally a process of law. A man may enter a public house without asking the owner's leave; so a landlord may justify entering to distrein for rent; a commoner to attend his cattle commoning in another's land; and a reversioner to see if any waste be committed on the estate. The poor also, by the Common Law, may enter and glean on another's ground after harvest. Badgers and foxes, or any other ravenous beast, may be hunted in another man's land, the destruction of them being of public utility: but in cases where a man makes an ill use of the power he has, he shall be deemed a trespasser from the beginning; as where a man, contrary to the inclinations of the owner, will stay unreasonable hours at a tavern, even his entry into the house is accounted



counted a trespass: but refusing to pay for what he calls for, will not make him a trespasser; the publican's remedy here is by an action of debt. In the case, however, of any irregularity of a landlord distreining for rent, it is enacted by 11 Geo. II. c. 19. That such irregularity shall not make his first entry a trespass, but the party injured shall have a special action of trespass or on the case, for the real specific injury sustained, unless tender of amends hath been made. In hunting foxes or badgers, though a man may justify going upon another's ground, he cannot justify breaking the ground to dig them out. A man may also justify in an action of trespass, where the right of entry is in himself, which brings the title of the estate in question. To prevent, however, vexatious and trifling actions of trespass, as well as other personal actions, the 43 Eliz. c. 6. and 22 and 23 Car. II. c. 9. sect. 136. declare, That where the jury, who try an action of trespass, give less damages than forty shillings, the plaintiff shall be allowed no more costs than damages; unless the judge shall certify under his hand that the freehold or title of the land came chiefly in question. But there are two exceptions made by subsequent statutes, one of which, 8 and 9 W. III. c. 11. enacts, That in all actions of trespass, wherein it shall appear that the trespass was wilful and malicious, and it be so certified by the judge, the plaintiff shall recover full costs. Now every trespass is held to be *wilful*, when the defendant has been fore-warned of; and every trespass *malicious*, though the damage given be less than forty shillings, where it plainly appears that it was the defendant's intent to trespass and vex the plaintiff. The 4 and 5 W. and M. c. 23. gives full costs against any inferior tradesman, apprentice, or other dissolute person convicted of a trespass in hawking, hunting, fishing, or fowling upon another's land. And in this statute it is held, that if a person be an inferior tradesman, as for example, a clothier, it matters not what qualification he may have in point of estate; but if he be guilty of such trespass, he shall be liable to pay full costs.

III. The next species of real injuries to a man's lands is by nuisance. Nuisances are of two kinds, *public* and *private*; public we shall speak of under public wrongs; at present, therefore, we will confine ourselves to private nuisances, of which there are several kinds: such as may affect corporeal hereditaments, and such as damage incorporeal ones.



1. With respect to corporeal hereditaments: if a man erects a building so close to mine, as that his roof shall over-hang mine, and throw the water on my roof, or shall obstruct or darken such of my windows as have existed time out of mind, it is a nuisance, for which an action will lie; I say, time out of mind, for if my house be lately built, it was folly in me to build so near the ground of another, on which he has as much right to erect a building as myself; I must plead therefore custom, or ancient windows, to preserve them from obstruction. Keeping hogs or other noisome animals so near another's house as to stench the air, is a nuisance; so is an offensive trade, as a tanner's, tallow-chandler's, &c. which should be exercised in some remote place. So if my neighbour neglects to fence or ditch, by which my lands are overflowed, it is also a nuisance. It is likewise a nuisance to stop or divert water that runs to another's meadow or mill; or to corrupt a watercourse by erecting a dye-house or a lime-pit in the upper part of the stream; in short, to do any act that is injurious to my neighbour.

2. The same reasoning holds good in incorporeal hereditaments. If any one obstructs the way to my grounds; or where I have a right to hold a fair or market, erects another so near me as to injure me; they are nuisances: but in the latter case, I must prove that my fair or market is the elder one, and that the new fair or market is within seven miles of mine. So erecting a ferry so near another antient ferry as to injure it, is a nuisance, because ferries, by prescription, are bound to be kept up for the public use, on pain of the owner's being amerced for the neglect; and it would be unjust to let a new ferry share the profits which does not share the burden: but where the reason ceases, the law also ceases, of course it is no nuisance to erect a mill so near another, as to draw away the custom; unless it also intercepts or draws away the water. Neither is it any nuisance to set up a school or trade in rivalry with another, for by such emulation the public are like to be gainers.

As the law gives no private remedy but for a private injury, so no action will lie for a public nuisance. The remedy in such a case is by indictment at the suit of the King, except where a private person receives some extraordinary injury by a public nuisance; as if a gravel-pit or ditch be left open in a public way, and a man on horseback fall therein; in which case an action for damages will lie. But, if



a man takes upon himself to remove the nuisance that offends him, he can have no action for it. An action on the case will recover damages for a nuisance, but not remove it; however as a continuance of a nuisance is a fresh nuisance, a fresh action will lie, if it be not removed, and more exemplary damages of course be given in a second verdict than in the first: but if an ill-natured neighbour will be obstinate enough rather to pay frequent damages and costs than remove the nuisance; the party grieved must have recourse to a particular writ, which, though subject to great delay, will, in the end, send the sheriff with his *posse comitatus*, or power of the county, to level it.

IV. The next kind of injury to real property, is waste or destruction of the estate in houses, woods, or lands, either by a voluntary demolition, or a neglect in repairing them: but as we have treated on this subject before, we have only now to consider to whom such waste is an injury, and what remedy the law has provided for it.

1. Those only are injured by waste, who have some interest in the estate wasted. A man who has the absolute fee-simple of the estate, without any incumbrance or charge upon it, may commit what waste he pleases; but where a person has right of common in the place wasted, as a right of cutting and carrying away wood for firing or repairs; if the owner of the wood demolishes the whole wood, it is an injury to the commoner, and he can recover damages for this waste by an action on the case.

But he who is most hurt by waste, is the remainder-man or reversioner of an estate, after a term for life or years is expired: here, if the preceding holder of the land, whether it be tenant in dower or curtesy, or lessee for life or years, if he was answerable for waste at the Common Law, and commits or suffers any, it is a manifest injury to him that has the inheritance, and he may sue for, and recover, damages. But he who hath the remainder for life only cannot sue for waste, as he may never perhaps come into possession, of course can sustain no certain injury. Yet a rector, vicar, archdeacon, prebendary, and the like, who are seised or possessed in right of their churches of any remainder or reversion, may hold an action of waste, it being for the benefit of the church and their successor.

2. By a writ of *estrepement*, an old French word, signifying waste, directed to the sheriff; the sheriff is bound to prevent any waste com-



mitting, even by imprisoning the wasters, if necessary, or granting a warrant for others to do it; but if this writ be sued out and directed and delivered to the tenant himself, and he afterwards proceeds to commit waste, the party grieved shall recover damages on a verdict; or he may punish the defendant for the contempt; for if the writ be delivered to either the tenant or his servants, and they proceed to commit waste, the court will imprison them for contempt. But courts of equity will on complaint grant injunctions to stay waste, till the defendant shall put in his answer, and the court shall thereupon make further order; which now is the customary method of preventing waste. Where tenants in common or joint-tenants commit waste, either may bring an action of waste against the other, compelling the defendant either to divide the estate and take the part wasted to himself, or to give security not to commit any further waste: but the waste here complained of must be something considerable; on trifling sums, such as a few pence or shillings, the plaintiff shall not recover in an action of waste. On a writ of waste, the plaintiff shall recover treble the damages assessed by a jury from an inspection of the waste committed; and no defence set up that it was done by a stranger, shall acquit the defendant; the only thing given in evidence of use to the defendant, will be, to prove that the destruction happened by lightning, tempest, the King's enemies, or other inevitable accident. If done by a stranger, the defendant may have an action against such stranger, and shall recover the damages he has suffered in consequence of it.

V. Subtraction is non-observance of any of those conditions, by which a man holds his estate, such as neglecting to swear fealty to the lord of the manor, to attend his courts, or to render the rent or service reserved; these are an injury to the freehold of the lord, by diminishing and depreciating the value of his seigniory.

The general remedy for all these is by distress, and the only remedy for the first two; what distresses are has been shewn before. (See book III. chap. i. sect. IV.) But no distress upon these occasions can be too large, for be it of what value it may, there is no harm done, as it must be restored on satisfaction being made. A distress that has no bounds with regard to its quantity, and may be repeated from time to time, must soon get the better of an obstinate party. This unbounded



unbounded distress is called a distress infinite, and is used upon other occasions, as summoning jurors, and the like.

For subtraction or with-holding of rents or services, the remedy is by action of debt. There are other modes of recovering it, but this is the usual one. With respect to leaseholders, by 11 Geo. II. c. 19. sect. 16. it is enacted, That where any tenant at rack-rent shall be one year's rent in arrear, and shall desert the demised premises, leaving the same uncultivated or unoccupied, so that no sufficient distress can be had; two justices of the peace (after notice affixed on the premises for fourteen days without effect) may give the landlord possession thereof, and thenceforth the lease shall be void. In writs of assize for rent, or on a replevin, should the tenant disclaim or disown his tenure, by which the lord would lose his verdict; the lord may immediately have a writ of right, grounded on this denial of tenure; and shall, on proof of the tenure, recover back the land itself so holden, as a punishment to the tenant for such his false disclaimer.

Where a tenant in fee-simple pays more services to the lord than he has a right to claim, through some former inadvertent payments either of himself or his ancestors; he may by a writ of *ne injuste vexes* remedy this injury by ascertaining the services and reducing them to their original standard: but a tenant in tail may remedy such an injury, owing to over payments of his ancestors, by a plea to an avowry in replevin. Where an under-tenant is distressed upon by the lord paramount for the rent due to him by the mesne or middle lord; such tenant by a writ of mesne shall have judgment to be acquitted or indemnified by the mesne lord; and if he does not make the satisfaction enjoined, or does not appear originally to the tenant's writ, he shall lose his claim upon the tenant, and the tenant shall hold immediately of the lord paramount himself.

So to remedy the neglect of other services, as to oblige the inhabitants of a certain spot to grind their corn at such a mill; which was originally erected for their benefit; if such services can be proved by ancient custom, the damages may be recovered for non-observance of them, on a writ *de secta ad molendinum*: but besides these special remedies for subtraction, an action on the case will lie for them all, and entitle the injured party to a satisfaction.

VI. Disturbance is the last we have to mention of real injuries, which is hindering or disturbing the owners in the regular and legal enjoyment



enjoyment of certain incorporeal hereditaments. Of this injury there are five kinds: 1. Disturbance of franchises; 2. Of common; 3. Of wages; 4. Of tenure; and, 5. Disturbance of patronage.

1. Disturbance of franchises is interrupting a man in the legal exercise of holding a court-leet, keeping a fair or market, of free-warren, taking toll, seizing waifs, estrays, or in short in doing any other thing he may have a privilege or franchise for. Prevailing on suitors not to appear at the lord's court, or any way preventing them; obstructing the passage to a man's fair or market; hunting in his free-warren; refusing to pay the accustomed toll, or the like, is considered as a disturbance of franchise; for which the party grieved, by an action on the case, shall recover damages; but for non-payment of toll he may, if he pleases, distress.

2. Disturbance of common is interrupting or infringing upon a man's right of common; as by turning cattle on a common where we have no right; turning on improper or uncommonable cattle, where we have a right of common, as hogs or goats. But the lord, if it has been customary, may turn a stranger's cattle upon the common, or cattle that are not commonable. He may also make burrows and turn in rabbits, provided they are not suffered to increase so much as to destroy the common. In general, however, stranger's and uncommonable cattle, if found on the land, may be distrained by the lord or the commoners: or if the injury be considerable, the commoner may recover damages by an action on the case; if inconsiderable, the lord only can bring an action, and that for the entry and trespass.

Overstocking a common is also a disturbance; or turning in more cattle than we have a right to do; but this holds good only with limited commons; but even where commonage is without stint, there must be still left sufficient for the lord's own beasts. For overstocking, the lord may either distress all above the number allowed, or may bring an action of trespass; or he or any commoner may bring a special action on the case. To ascertain what number every commoner has a right to turn on, the common may be proportioned by a writ of admeasurement; and the rule is, that no commoner shall turn on more cattle, than his own land will, with the assistance of the common, support. If a commoner overstock the common a second time, he shall, upon judgment being given against him, for such second surcharge, not only



only pay damages to the plaintiff, but forfeit such supernumerary cattle turned on to the King.

Another injury falling under this head, is when the owner of the soil, or other person so encloses or otherwise obstructs the common, that the commoner is thereby shut out from enjoying the benefit: which may be done by erecting fences, driving off the cattle, ploughing up the soil, or stocking it with rabbits in such quantities as to destroy it. The usual remedy in these cases is by an action on the case for damages. But by the statute of Merton, 20 Hen. III. c. 4. the lord may enclose and convert to the uses of husbandry any waste grounds, woods, or pastures, in which his tenants have common appendant to their estates (that is, where the common is limited, and not without stint) provided he leaves sufficient common to his tenants, according to the proportion of their land. By Westm. 2. 13 Edw. I. c. 46. no action shall lie against a lord for erecting on the common any windmill, sheep-house, or other necessary buildings therein specified; and upon this statute it is held, that the lord may make any other necessary improvements, though, by so doing, he even abridges the common, and makes it less sufficient for commoners. And by 29 Geo. II. c. 36. and 31 George II. c. 41. any lords of waste and commons, with the consent of the major part in number and value of the commoners, may inclose any part thereof for the growth of timber and underwood.

3. Disturbance of ways is similar in nature to that of commons, it chiefly happening when any man's right to a way over another's grounds is by any means obstructed, even by ploughing across it. If it be a way annexed to his estate, and the obstruction be made by the tenant of the land, it is a nuisance, and may be remedied accordingly; but if the right of way, thus obstructed by the tenant, be annexed only to a man's person, and unconnected with any lands or tenements; or if the obstruction of a way belonging to a house or land is made by a stranger, it is then, in either case, a disturbance only, and is to be remedied by an action on the case for damages.

4. Disturbance of tenure is driving a tenant off an estate. For example: where a stranger, either by menaces or threats, or by any other means, contrives to drive away a tenant at will of any lands or tenements, or even inveigles him to quit, the law considers it as an injury



injury to the landlord of an atrocious nature, and by special action on the case will give him damages against the offender accordingly.

5. The last and most considerable species of disturbance is that of patronage, which is obstructing a patron in his presentation to a living.

Where a person, that hath no right, presents a clerk to a living, and that clerk be instituted; this is called a Usurpation, and is a species of disturbance: but if the real patron pursues his right by a possessory action, within six months after the avoidance or the living's becoming vacant, he shall recover his presentation; if he neglects it in the six months, he shall, for the peace of the church and for his own neglect, lose the turn for that time, and without remedy.

The pretended patron then, the clerk presented, and the bishop instituting, may be disturbers of patronage, and the law has given the injured patron (besides the writ of right of advowson, which is a final remedy) a possessory action for his relief, *viz.* a writ of *quare impedit*, in which the patron is always the plaintiff.

On the vacancy of any living, the patron is bound, as we have seen, to present within six calendar months, or it will lapse to the bishop: on this presentation, if the clerk be qualified, the bishop is bound to institute him. Where there is any dispute about the right of presentation, each party enters a *caveat* with the bishop to suspend institution; for in the spiritual courts (though temporal courts pay no regard to it) institution after a *caveat* is void. If two presentations be offered to the bishop upon the same vacancy, the bishop may suspend the admission of either clerk, suffering the living to lapse: but if the patron or clerk on either side request him to award a *jus patronatus*, he is obliged to do it: this is a commission from the bishop to his chancellor, to summon a jury of six clergymen and six laymen to examine who is the real patron; and if upon such examination and certificate returned thereof, he institutes the clerk of that patron they return as the true one, the bishop is no longer a disturber, let the event turn out as it will.

The clerk refused by the bishop may also have a remedy against him, by appeal to the court of his next immediate superior, as from a bishop to his metropolitan, from the archbishop to the delegates, and if this superior court adjudges the refusal to be insufficient, it will grant institution to the appellant.

But



But contested presentations seldom go so far; for, on the first refusal or delay of the bishop, the patron usually brings a writ of *quare impedit*, which, if properly proceeded on, will give the injured party damages, and his right of presentation, provided the writ be brought within six months of the avoidance, or the clerk be not instituted; and to prevent such admission and institution, the writ of *quare impedit* should be accompanied with a writ of *ne admittas* delivered to the bishop: for should the bishop institute after the receipt of such a prohibitory writ, the plaintiff will have a special action for damages against the bishop, and the clerk instituted will be ejected on a judgment obtained in the *quare impedit*, even though the pretended patron's right may have been supposed to be found in a *jus patronatus*. But should the bishop have instituted the clerk before the receipt of the writ of *ne admittas*, which is a notice, the real patron is left to his *quare impedit* merely; which lies as well upon a recent usurpation within six months past, as upon a disturbance without any usurpation at all.

If it be found that the right of presentation is in the plaintiff, and that he commenced his action in due time, he will recover the presentation, and move the person instituted, unless during the litigation it lapsed to the ordinary, he not being party to the suit; (to prevent this, however, the bishop should be made a party to the suit, by naming him in the writ) in which case he loses his presentation indeed for that turn, but shall recover from the pretended patron, as a satisfaction for his loss, two years full value of the living; and if the patron be insolvent, he shall be imprisoned for two years. But should the living continue vacant till the end of the suit, he who is found to have the right of presentation may present, and if the bishop refuses to admit, the patron, in a writ of *quare impedit*, may recover of the bishop ample damages.

In the presentation to such livings as belong to Roman Catholic patrons, and which are vested in the universities of Oxford and Cambridge, a new method of proceeding is by 12 Ann. st. 2. c. 14. sect. 4. provided, *viz.* that besides the writ of *quare impedit*, which the universities, as patrons, are entitled to bring, they, or their clerks, may be at liberty to file a bill in equity against any person presenting to such livings, or any other person whom they have cause to suspect as disturbers; in order to compel a discovery of any secret trusts, for the benefits of papists, in evasion of those laws whereby this right of ad-



vowson is vested in those learned bodies: and also by 11 Geo. II. to compel a discovery, whether any grant or conveyance were made *bona fide* to a protestant purchaser, for the benefit of protestants, and for a full consideration; without which requisites every such grant and conveyance of any advowson or avoidance is absolutely null and void. In no instance but this, does the law allow the clerk to be plaintiff in recovering a presentation.

#### C H A P. IV.

#### OF REDRESS BETWEEN A SUBJECT AND THE CROWN.

**H**AVING considered the injuries that arise between subject and subject, we proceed next to those between a subject and the crown.

It is a fundamental principle of our constitution, that the King can do no wrong: by which is understood, that whatever may be wrong in the conduct of public affairs, it is not chargeable on the King personally, but on his ministers; and they only are accountable for it. And as the royal prerogative extends not to any injury of the people, but is created for their benefit, any thing happening from misinformation and inadvertency, to the injury of a subject, will be immediately redressed by an application to the King, through any of his judges.

Personal injuries to a subject, from the great distance between the people and the throne, can very *rarely* happen; indeed the law supposes in decency that they never *can* happen, and therefore has provided no remedy: injuries, however, to a subject's right of property may occur, but this must be through the officers of the crown, in whom the law, in matters of right, entertains no respect or delicacy.

The Common Law methods of obtaining possession or restitution of property from the crown, are by petition or manifestation of right, both which may be prosecuted either in Chancery or the Exchequer; and, by several statutes, all inquisitions of office are allowed to be traversed or denied wherever the right of the subject is concerned, except in a very few cases. These proceedings are usually had in the petty bag office in the court of Chancery; and if the right be determined against the King, the crown is instantly out of possession; so that there needs no transfer of the seisin, or possession from the King to the party



party aggrieved. But the methods of redressing such injuries as the crown may receive from a subject, are,

1. By such Common Law actions as are usual and consistent with the royal prerogative and dignity. From the legal ubiquity of the King, he cannot be dispossessed of any property once vested in him; of course he can maintain no action which supposes a dispossession of the plaintiff; such as an assize or ejectment; but he may bring a *quare impedit*, which always supposes the complainant possessed of the advowson. To enter into all the nice distinctions of the law respecting the crown would be tedious and unnecessary; let it suffice to say, there are certain prerogative modes of process peculiar to it.

2. Such is the inquest of office; which is an inquiry made by the King's officers, his sheriff, coroner, or escheator, or by commissioners specially appointed, concerning any matter that entitles the King to the possession of property. Every jury that tries a man for treason or felony, every coroner's inquest and the like, is an inquest of office, and by virtue of this office found, the King is entitled to have his forfeiture. In case of attainder for high treason, by 33 Hen. VIII. c. 20. the King shall have the forfeiture instantly, without any inquisition of office. And by the Bill of Rights at the Revolution, 1 W & M. st. 2. c. 2. it is declared, That all grants and promises of fines and forfeitures of particular persons, before conviction (which is here the inquest of office) are illegal and void. This was the law of the land in the reign of Edward the Third.

With respect to real property, if an office be found for the King, it puts him in immediate possession without the trouble of a formal entry, and the King shall receive all the profits from the time his title took place. So if any land be taken into the King's possession unjustifiably, on the King's quitting possession again, the owner shall have the intermediate profits restored to him.

In order to avoid the possession of the crown, acquired by such inquest of office, a man may not only have his petition of right, which discloses new facts not found by the office, and his plea or manifestation of right, which relies on the facts as found: but he may in general traverse or deny the matter of fact, and put it in a course of trial by the common law process of the court of Chancery.

3. Where the King hath indiscreetly granted any thing by letters patent, which he should not have done, or where the patentee hath



done any thing to forfeit the grant, the patent may be repealed in Chancery.

4. The King can recover money or other chattels, or can obtain satisfaction in damages for any personal wrong committed in the possessions of the crown; as holding over after the determination of a lease; cutting down timber and the like; by an information filed in the Exchequer by the attorney-general, who then informs the court of the matter in question, in which the party complained of is put to answer, and trial is had, as in suits between subject and subject. Money due to the King, and forfeitures on penal statutes are recovered this way. Mere matters of police and public convenience are usually enforced by common informers, as the statutes direct.

5. In order to determine the right, where any man claims an office, franchise, or liberty, and to enquire by what authority he supports his claims, a writ of *quo warranto* is issued for the King, in the nature of a writ of right. It lies also in case of a long neglect of franchise or abuse of it: commanding the defendant to shew by what warrant he exercises such a franchise, having forfeited it perhaps by neglect or abuse. This writ must be prosecuted before the judges at Westminster, and, if the party has no right to the franchise, will turn him out.

6. When a person is entitled to an office or place in any corporation, and refused admission, or wrongfully removed when legally possessed; upon application, the prerogative writ of *mandamus* will be granted him to compel his admission or restitution. It may also be issued to compel a city or borough town to proceed to the election of their chief magistrate, in case they omit it at their regular time.

We have now gone through the whole circle of civil injuries, and the redress the laws have provided for each, and I may venture to affirm, that there is scarce a possible injury that can be offered, either to the person or property of another, for which the party injured may not find a remedial writ, conceived in such terms as are properly adapted to his own particular grievance.

Having then pointed out the nature of the several courts of justice, and shewn to which of these courts redress must be applied for, in every particular case, and in what way; I should now in the last place examine the manner in which the several remedies are pursued and applied by action; I mean the modern methods of practice in our courts  
of



of judicature : but as this is not of use to a general reader, being the professional study of a lawyer, we will not swell the work with the detail. The practice of the court of Common Pleas, and which in all material points is the same with the practice of the court of King's Bench, and the Common Law part of the Exchequer, may be found in Gilbert's History and Practice of the court of Common Pleas, by those who are desirous of studying it. I shall only observe, that when any one has received an injury, for which he seeks satisfaction, according to the redress the law has given him in his case, if he sues in the court of Common Pleas, he is to make application to the King, through the court of Chancery, for that original writ, that is necessary to commence his suit, which is a kind of mandatory letter directed to the sheriff, requiring him to command the aggressor either to do justice to the complainant, or appear in court, and answer the accusation against him. On this foundation the judges of the court proceed. To try causes in courts baron or the county court, there is no need of this writ, the cause is there begun by a private memorial tendered to the judge in open court. Nor is a suit always begun in the King's Bench by this original writ, but by a peculiar process of its own. Means are next taken to compel the defendant to appear, which in the court of King's Bench, if the plaintiff swears the debt is ten pounds, is by attachment or arrest, which the sheriff of the county where the party resides, or his officers execute; and the defendant being taken, is kept in custody, unless he gives bail, that is, security, that he will appear at the proper time. If he does not appear, the bail are obliged to pay the debt, but may have a warrant to take the body of the defendant whenever and wherever they can find him. But where a defendant absconds, the plaintiff may proceed to outlaw him, which is done by the sheriff of the county ordering him to be proclaimed in five county courts successively, calling upon him thus to appear; if he does not, he shall be outlawed by the coroners of the county, which outlawry puts a man out of the protection of the law; so that he is incapable to bring any action for redress of injuries, and forfeits all his goods and chattels to the King: and if after outlawry the defendant appears publicly, he may be taken into custody and committed till the outlawry be reversed; which reversal may be had by the defendant's appearing personally in court or by his attorney; but then he must pay full



full costs, and put the plaintiff in the same condition as if he had appeared at first.

If the debt be under ten pounds, or the plaintiff does not swear to the debt, or does not wish to hold the defendant to bail, he serves him, as it is called, with a copy of a writ; which is done by the sheriff or his officer's delivering personally to the defendant a notice to appear in court by his attorney, at a certain time to defend the action. If after this notice he should not appear, the plaintiff may enter an appearance for him and proceed, as if the defendant had done it himself, till judgment by default is obtained against him. But if the defendant appears by his attorney, and the plaintiff drops the cause, or delays it beyond the time allowed, he is non-suited, and shall pay costs to the defendant; but notwithstanding this, he may commence his suit at some other time.

If the defendant wishes to delay the progress of the suit, he may do it for some little time by dilatory pleas; or if he has special pleas to make, in bar of the plaintiff's demand, he may thus totally stop the suit. The statutes of limitation is a sufficient plea for this purpose; for by most acts of parliament, there is a time limited, beyond which no plaintiff can lay his cause of action; designed to preserve the peace of the kingdom, and to prevent those innumerable perjuries which might ensue, if a man were allowed to bring an action for any injury committed at any distance of time. If therefore, in any suit, the injury or cause of action happened earlier than the period expressly limited by law, the defendant may plead the statutes of limitations in bar: as upon a prosecution for a promise to pay money to the plaintiff, the defendant may plead that he made no such promise within six years, which is an effectual bar to the complaint.

Now the time limited by 32 Hen. VIII. c. 2. in a writ of right is sixty years; in assizes, writs of entry, or other possessory actions real, of the possession of one's ancestors, in lands, or either of our own or their possession in rents, suits, and services, fifty years; and in real actions for lands, grounded on one's own possession, such possession must have been within thirty years: but this limitation does not extend to any suit for advowsons. 1 Mar. II. c. 5. A possession of sixty years now is a bar even against the King, 9 Geo. III. c. 16. The time of limitation in an action of formedon, which is a tenant in tail's



tail's writ of right, is, by 21 Jac. I. c. 16. twenty years, and of course twenty years is also the limitation in every action of ejectment; for no ejectment can be brought, unless where the lessor is entitled to enter on the lands; and, by 21 Jac. I. c. 16. no entry can be made by any man, unless within twenty years after his right takes place. In all actions of trespass, detinue, trover, replevin, account, and case, (except on account between merchants) debt on simple contract, or for arrears of rent, the time of limitation is six years after the cause of action commenced: and actions of assault, menace, battery, mayhem, and imprisonment, must be brought within four years, and actions for words, within two years after the injury committed. And, by 31 Eliz. c. 5. all suits, indictments, and informations upon any penal statutes, where any forfeiture is to the crown, shall be sued within two years, and where the forfeiture is to a subject, within one year after the offence committed, unless where any other time is specially limited by the statute. And lastly, no writ of error, *scire facias*, or other suit shall be brought to reverse any judgment, fine, or recovery for error, unless it be prosecuted within twenty years. 10 W. III. c. 14. But where is no interruption to the progress of the suit, the trial is soon brought on.

1. An arrest is the taking a person into custody, by virtue of a writ of *capias*, directed to the sheriff, who, upon this, grants a warrant to his bailiffs to serve it upon the party. Now an arrest must be by corporal seizing or touching the party's body. After which the bailiff may justify breaking open the house in which he is to take him; otherwise he has no such power, but must watch his opportunity to arrest him; (though if the outward door be open to him, he may break open inward doors. *Foff. 319.*) for a man's house is looked upon in the law as an asylum, which in the Civil Law is carried so far, that no citation or summons, much less an arrest, can be executed on a man, within his own walls. Peers of the realm, members of parliament, and corporations, are privileged from arrests, and of course from outlawries: also clerks, attornies, and all other persons attending the courts of justice are not liable to be arrested; but must be sued by bill of privilege; nor are clergymen, by 50 Edw. III. c. 5. and 1 Ric. II. c. 16. performing divine service, and not merely staying in the church or church-yard with a design to avoid it; nor members of Convocation actually attending thereon;



8 Hen. VI. c. 1. nor suitors, witnesses, and other persons necessarily attending any court of record upon business, or even in coming or going. Nor can any arrest be made in the King's presence, nor within the verge of his palace, or in any place where the judges are actually sitting, nor on a Sunday, except for treason, felony, or breach of the peace: nor can any process be served on a Sunday, 29 Car. II. c. 7. except citations or excommunications from the spiritual courts. *Gibbs*. 271. The King hath a special prerogative, though he seldom exerts it, that of privileging a person from all personal, and many real suits, for one year at a time, but no longer. And by the Common Law the King might protect his creditor from arrests and suits till the King's debt were paid; but by 25 Edw. III. st. 5. c. 19. notwithstanding such protections, another creditor may proceed to judgment against him, with a stay of execution, till the King's debt be paid, unless such creditor will undertake for the King's debt, and then he shall have execution for both.

#### CHAP. V.

### OF TRIAL, JUDGMENT, EXECUTION, AND THEIR INCIDENTS.

**I. TRIAL** by jury seems to have been coeval with the first civil government of this nation, and has ever been esteemed in all countries as a privilege of the highest and most beneficial nature. A thorough knowledge of it, therefore, cannot but be acceptable to every gentleman in the kingdom; and in explaining it, we will follow the order and course of its proceedings in the court of Common Pleas.

The sheriff's warrant or writ to summon the jury is returned with the names of the jurors in a little pane of parchment annexed, called a *Panel*, on the last return of one term, and a fresh writ is issued to the sheriff to compel them to attend on the first day of the next, on pain of their lands and goods being by him distrained; unless the judges shall hold assizes in the county before, then to attend on the day when the said judges open their commissions on their circuits, which day is specified and punctually observed. If the sheriff be a party in the suit to be tried, or any way related or connected with  
either



either of the parties, so as not to be supposed quite impartial, he is not trusted to return the jury, but the writ issues to the coroner for that purpose; if any exception lies to the coroners, the writ is directed to two clerks of the court, or two persons of the county named by the court, and sworn; and these two, called Electors, shall indifferently name the jury, and their return is final, no challenge being allowed to their array.

We see here that the person appointing the jury, is a man of some fortune and consequence; and, of course, supposed to be above committing wilful errors, and he is also bound by oath faithfully to perform his duty, and that he may not be supposed to summon an interested jury; if he has any interest or connection in the cause, he is not suffered to name them. After the jury is named, it is also some weeks before they are summoned, in which time the parties may enquire into their characters, connexions, &c. so that they may be challenged or excepted to upon just cause, and they are called upon to attend in their own neighbourhood, to avoid unnecessary expences to them and to the witnesses; and that the persons trying the cause may not be supposed to be interested, and to prevent factions and parties, a judge of a superior court is appointed for that purpose, who is a stranger in that part of the country; for to remove all suspicion of partiality, it is wisely provided by statute, that no judge of assize shall hold pleas in any county where he was born or inhabits.

When the day of trial is fixed, the plaintiff's attorney must bring down the record to the assizes, and enter it with the proper officer, in order to its being called on in course; which if not done, the plaintiff shall be esteemed nonsuited, and judgment shall be given for the defendant. Where the plaintiff means to try the cause, if the defendant lives within forty miles of London, he is obliged to give him eight days notice of trial, and if he lives at greater distance, then fourteen days notice, in order to prevent surprize: and if the plaintiff then changes his mind, and does not countermand the notice six days before the trial, he shall be liable to pay the defendant's costs, for not proceeding. Either of the parties, however, upon good cause shewn to the court above, as upon the absence or sickness of a material witness, may obtain leave upon motion to defer the trial till the next assizes.

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But when the cause is called on in court, the record is given to the judge, for him to peruse and observe the pleadings, and what the parties are to prove, while the jury is called and sworn. Juries are either *special* or *common*. If the cause is of too delicate a nature for a jury of common freeholders to try, the sheriff, upon a motion in court, and a rule granted thereon, is to attend the proper officer with his freeholder's book, and the officer is to take indifferently forty-eight of the principal freeholders, in the presence of the attornies on both sides, who are each of them to strike off twelve, and the remaining twenty-four are returned. This is called a special jury. And, by 3 Geo. II. c. 25. either party is entitled, upon motion, to have a special jury struck upon the trial of any issue, as well at the assizes as at bar; he paying the extraordinary expence, unless the judge will certify that the cause required such special jury. A common jury is appointed agreeable to 3 Geo. III. c. 25. which directs that the sheriff or officer shall not return a separate panel for every separate cause as formerly, but one and the same panel, for every cause to be tried at the same assizes, containing not less than forty-eight, nor more than seventy-two jurors: and that their names, being written on tickets, shall be put into a box or glass; and when each cause is called, twelve of these persons, whose names are first drawn, shall be sworn upon the jury, unless absent, challenged, or excused; or unless a previous view of the messuages, lands, or place in question shall have been thought necessary; in which case six or more of the jurors returned, to be agreed on by the parties, or named by a judge, or other proper officer of the court, shall be appointed by special writ to have the matter in question shewn to them by two persons named in the writ, and then such of the jury as have had the view, shall be sworn on the inquest previous to any other jurors.

As the jurors appear when called, they are sworn, unless challenged by either party. In some cases the array may be challenged; that is, the whole jury objected to; as for example, where there shall appear some partiality in the sheriff or officer who arrayed the panel, or if the panel be arrayed at the nomination or under the direction of either party, or if one of the parties to the suit be an alien, and a jury consisting of half foreigners be not returned agreeable to the order of the court so given, pursuant to 8 Hen. VI. c. 29. which exacts that when either party is an alien born, the jury shall be one half denizens  
and



and the other aliens (if so many be forth coming in the place) for the more impartial trial. A privilege which strangers are allowed in no other country in the world. But where both parties are aliens, the jury shall all be denizens. But in all cases, challenges or exceptions may be made to particular jurors: as, if a lord of parliament be impanelled, either party may challenge him, or he may challenge himself; if a jurymen be an alien born, or a bondsman; or if he have not a sufficient estate, namely, ten pounds a year in England freehold or copyhold, and six pounds in Wales; or a leasehold for five hundred years, or for any term determinable on life or lives of the clear yearly value of twenty pounds, over and above the rents reserved; or in Middlesex, if he is not a leaseholder of fifty pounds a year clear; or in London, or Westminster, is not worth one hundred pounds. But when a jury consists of half aliens and half denizens, no want of lands shall be cause of challenge to the alien, he being incapable of holding any. A juror may also be challenged for suspicion of partiality, as that he is of kin to the party within the ninth degree; that he has been arbitrator on either side; that he is interested in the cause; that an action is depending between him and the party; that he has been bribed; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, or attorney, or belongs with him to the same corporation or society; that he is acquainted with the party or the like; the validity of which is left to the determination of two *triers*, indifferent persons, who are appointed by the court for that purpose. Particular crimes also will render a juror challengeable; as where he has been convicted of treason, felony, perjury, or conspiracy, or hath received judgment of the pillory, or to be branded, whipt, or stigmatized; or if he be outlawed or excommunicated, or hath been attainted of false verdict, *præmunire*, or forgery.

Certain men are exempted from the office of jurors, *viz.* sick and decrepid persons, persons not resident in the county, men above seventy years old, and under twenty-one; physicians and other medical persons, counsel, attornies, officers of the courts, and the like, and clergymen, unless possessed of lay lands and tenements, and not in the service of the King, or some bishop. It is denied, however, by some, that clergymen can be ever impanelled. *Lamb.* 396. Dissenting teachers, qualified under the toleration act are also exempted; 1 W. III.



c. 18. f. 11. and quakers. 7 and 8 W. III. c. 34. f. 6. But the jurors ought to come and claim their privileges, for the sheriff cannot return it. *Tr. p. pais.* 87.

If, by means of these challenges, there are not a sufficient number left, either party may request a *tales*, or a supply of *such* men as are summoned upon the first panel, in order to make up the deficiency: but at the assizes or *nisi prius*, the judge is empowered, at the prayer of either party, to elect persons present in court to join the other jurors, which persons however are liable to the same challenges. When a sufficient number is impanelled, they are separately sworn to try the issue between the parties, and to give a true verdict according to the evidence.

Need we here observe how scrupulously nice and impartially just is the law of England, in framing this tribunal for the test and investigation of truth?

The jury are now ready to enter into the merits of the cause, which is opened to them by the counsel for the plaintiff, stating the case minutely, every thing that hath been done in the cause, which is now to be tried, and what evidence they have in their favour: this evidence is then examined, and when gone through, the counsel for the defendant opens the adverse case, and supports it also by evidence; and then the party which began is heard by way of reply.

To enter into the great variety of nice distinctions with respect to what evidence is allowed to be given in particular cases, would be foreign to the design of this volume, which is not to form a lawyer, but to give a general reader a tolerable insight into the laws and constitution of his country. I shall only mention a few general maxims, with some remarks on the manner of giving evidence.

Evidence on trial is of two kinds, written, and *parol*, that is, verbal. Written evidence are records; ancient deeds of thirty years standing; modern deeds must be proved, and other writings. Ancient deeds prove themselves, but modern deeds and other writings must be proved by witnesses or *parol* evidence. In order to prove a lease for years, no evidence will be admitted, but the deed itself, if in being; but if that be proved to be destroyed, an attested copy may be produced, or verbal evidence given of its contents. No hear-say evidence is admitted (except in proof of general customs or matters of  
common



common tradition, or in some cases, where persons deceased have declared things in their life-time); of course no discourse with another will be received, but the person himself must attend. Books of accounts or shop-books are not admitted, though a servant who made the entry may refer to them to refresh his memory; but if such servant be dead, and his hand-writing be proved, the book may be produced in evidence. A man's own books of account accompanied with his oath, are, by 7 Jac. I. c. 12. admitted as evidence; yet confined to such transactions as have happened within one year before the action brought, unless between merchant and merchant in the usual intercourse of trade. In short, there is one general rule observed in all trials, which is, that the best evidence the nature of the case will admit of shall always be required, if possible to be had, if not possible, then the next best evidence that can be had.

Thus depositions of witnesses may be read, when the witness is dead, but not when the witness is living, except he be sought and cannot be found; or was subpoenaed and fell sick. *Theory of Evid.* 30. And it is an uncontested rule in all cases, that it is a good exception against a witness, that he is either to be a gainer or a loser by the event of the cause, immediately or consequently. 2 *Harw.* 433. But from necessity in many criminal cases, interested witnesses are allowed. 10 *Mod.* 193.

Witnesses are compelled to attend by a writ of *subpoena*, served upon them, which commands them, laying aside all excuses, to appear at the trial on pain of forfeiting one hundred pounds to the King, ten pounds to the party aggrieved, and damages equivalent to the loss sustained by want of such evidence. But no witness, unless his reasonable expences be tendered him, is bound to appear at all, nor when he appears, can he be compelled to give evidence, till such charges are actually paid him; except he resides within the bills of mortality, and is summoned to give evidence within the same. All witnesses that have the use of their reason are competent and allowed to be examined, except such as are informers, and not qualified for jurors, or are interested in the event of the cause. And no counsel, attorney, or other person intrusted with the secrets of the cause by the party himself, shall be compelled or perhaps allowed to give evidence of matters so intrusted to his secrecy: but he may be examined as to mat-  
ters.



ters of fact, execution of deeds or the like, which might come to his knowledge without being so intrusted.

One witness (if credible) is sufficient evidence of a single fact, where no more are to be had; but no one can be witness in his own cause: and as a witness is sworn to declare the *whole* truth; he is not to conceal any thing he knows, though he should not be examined as to that point: and all this evidence is to be given openly in court before all parties, each party having liberty to object to its competency, and to be allowed by a judge or not in court. And if the judge, either in his directions or decisions, mistakes the law, either through ignorance, inadvertency, or design; the counsel on either side may require him publicly to seal a bill of exceptions; stating the point wherein he is supposed to err, which, if he refuses, the party may have a compulsory writ against him to oblige him, if the fact alledged be duly stated: and if he returns, that the fact is untruly stated, when it is otherwise; an action will lie against him for making a false return. This bill of exceptions is in the nature of an appeal, examinable in the next immediate superior court, upon a writ of error, after judgment given in the court below. But the usual way now is, for any misdirection of the judge, to grant a new trial. Where a juror knows any thing of the matter in question, he may be sworn as a witness, and give his evidence in public court.

The evidence being gone through on both sides, the judge, in open court, sums up the whole to the jury, representing the facts as they appeared to him, stating the evidence given, with his own remarks upon the subject, and giving them his opinion where any matter of law arises. The jury then, unless the case be very clear, withdraw from the court to consider of their verdict; and, to prevent causeless delay, are not suffered to have either meat, drink, fire, or candle, unless by permission of the judge, till they are unanimously agreed. If they eat or drink at all, or have any eatables about them, without consent of the court, and before verdict, they are fined; and should they do so at the charge of the person in whose favour they give a verdict, it will set the verdict aside. Nay, if they speak with either plaintiff or defendant, or any of their agents, after they have left the court; or if they receive any fresh evidence in private; or if, to prevent disputes, they cast lots for whom they shall find, the verdict will be set aside. And it is held, that if the jurors do not agree in  
their



their verdict before the judges leave the town, they must follow them round the circuit in a cart.

When the verdict is agreed upon, the jury return to the court, and the crier is ordered to call the plaintiff, who must be present himself, or by his attorney or counsel, to hear the verdict given: and if the plaintiff does not appear, no verdict can be given, and he is said to be nonsuited. It is usual, therefore, for a plaintiff, when he or his council perceives that he has not been able to support his claim or issue, to withdraw in order to be nonsuited. The crier, however, calls the plaintiff, and if neither he, nor any one for him, appears, the jurors are discharged, the action is at an end, and the defendant recovers his costs. This is done to enable the plaintiff, at any time, to bring a fresh action for the same cause, which he could not do, if a verdict had been given against him, and judgment had passed in consequence. But should the plaintiff appear, the foreman of the jury delivers the verdict.

The verdict must ever be public, and in the court, or it is not a valid one; though if the judge adjourns the court to his own lodgings, and there receives it, it is still a public verdict. In giving the verdict the jury assess also the damages sustained by the plaintiff, for which the action was brought. Should there arise, in the course of the trial, any difficult matter of law, though the jury may, if they think proper, take upon themselves to judge of this matter; yet they generally in such cases, to avoid the danger of having their verdict attainted, find what is called a *special* verdict, and herein they state the naked facts as they find them to be proved, and pray the advice of the court thereon, concluding conditionally, that if, upon the whole matter, the court shall be of opinion, that the plaintiff had cause of action, they then find for the plaintiff, if otherwise, for the defendant. This is entered at length on the record, and is afterwards argued and determined in Westminster Hall. Or, the jury will find a verdict generally for the plaintiff subject to the opinion of the court, on a *special* case stated by the counsel on both sides, with regard to a matter of law, which is also called a special verdict.

The verdict being thus given in, it is recorded, and the jury are discharged.

II. Next follows the judgment of the court upon what has passed; which, for certain causes, may either be suspended or arrested. For



as it cannot be entered till the term next after the trial, and that upon notice to the other party, if any defect of justice happened at the trial, by surprize, inadvertency, or misconduct; the party aggrieved may have relief in the court above, by suspending the judgment, and obtaining a new trial; or if it appears that the complaint was either not actionable in itself, or not made with sufficient accuracy, the party may supersede it, by arresting or staying the judgment.

1. Cases for a new trial, are want of notice of trial; any flagrant misbehaviour of the party prevailing, towards the jury, which may have influenced them; where the judge certifies that the verdict is without or contrary to evidence, or that the damages given are too exorbitant; or where the judge has misdirected the jury. But on a second trial, if a new jury give a similar verdict, a third trial is seldom awarded. Was every verdict final in the first instance, it would in a great measure destroy the valuable method of trial by jury: for causes of great importance come often to be tried, where the nature of the dispute is attended with nice subtilties of law. Either party may be surprized by a piece of evidence, which had he been apprized of before, he might have explained or answered; or, he may be puzzled by a legal doubt, which a little recollection might have solved. In the hurry of a trial the ablest judge may mistake the law, and misdirect the jury: and as the jury are to give their opinion instantly, the most intelligent and best intentioned men may bring in a verdict, which, upon cool deliberation, they might wish to reverse. For all these reasons a new trial before a fresh jury may be occasionally proper, and the law has wisely provided that in such particular cases, it shall be allowed: but before such new trial is granted, counsel are heard on both sides to impeach or establish the verdict, and the court give their reasons at large, why a fresh examination ought or ought not to be allowed. But a motion for such new trial must be made within the first four days of the next succeeding term, within which term it is usually heard and decided.

2. Arrests of judgment may be obtained for any informality in the proceedings, as where the declaration varies from the original writ; where the verdict materially differs from the pleadings and issue thereon, as if, in an action for words, it is set forth in the declaration, that the defendant said, "The plaintiff is a bankrupt," and the verdict finds specially that he said, "The plaintiff *will be* a bankrupt;"

or



or if the case laid in the declaration is not sufficient in law to found an action upon, or the like. But if judgment is not arrested within the first four days of the next term after trial, it is then entered on the record.

Where a defendant, in an action brought against him, puts in no plea to stop the progress of the suit, or acknowledges the plaintiff's demand to be just; or when the defendant's attorney declares he has no instructions to say any thing in defence of his client; the plaintiff will obtain judgment by default, without the intervention of a jury: and if any of these happen in actions where the specific thing sued for is recovered, as in actions of debt for a sum certain, the judgment is complete and final (as it always is, where judgment is given for the defendant). And therefore it is customary in borrowing of money, in order to strengthen the lender's security, for the borrower to execute a warrant of attorney to some attorney named by the lender, empowering him to confess a judgment by any of the ways just now mentioned, in an action of debt brought by the lender against the borrower for the specific sum due: which judgment, when confessed, is absolutely binding and final; provided the same be abstracted and entered in a book according to the directions of the 4 & 5 of W. & M. c. 20. But where damages are to be recovered, a jury must be called in to assess them before a judge, unless the defendant, to save expences, will confess the whole damages laid or set forth in the plaintiff's declaration or state of his case.

Costs naturally follow judgments, which are taxed and moderated by the prothonotary or proper officer of the court. But the King, and any person suing to his use, shall neither pay nor receive costs; and the Queen consort participates of the same privilege. Executors and administrators, suing in right of the deceased, are also exempted from costs, if verdicts are given against them: and paupers, when plaintiffs, swearing themselves not worth five pounds. These are, by 11 Hen. VII. c. 12. to have original writs and subpoenas *gratis*, and counsel and attorney assigned them without fee; and are excused from paying costs when plaintiffs, by 23 Hen. VIII. c. 15. but shall suffer other punishment at the discretion of the judges. The antient custom was to give them their election, to pay costs or be whipped: but this is now refused: and it is agreed, that a pauper may recover costs, though he pays none; for the counsel and clerks are bound to give

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their



their labour to *him*, but not to his antagonists. To prevent trifling actions for words, assaults, battery, or trespass, it is enacted by several statutes, that where the jury shall give less damages than forty shillings, the plaintiff shall be allowed no more costs than damages, unless the judge before whom the cause was tried shall certify that an actual battery (and not an assault only) was proved, or that in trespass the freehold or title of the land came chiefly in question. Also by 4 & 5 W. & M. c. 23. and 8 & 9 W. III. c. 11. if the trespass were committed in hunting or sporting, by an inferior tradesman, or if it appear to be wilfully and maliciously committed, the plaintiff shall have full costs, though his damages, as assessed by the jury, amount to less than forty shillings.

Judgment being entered, execution immediately follows, unless the party condemned proceeds to reverse it, by a writ in the nature of appeal.

Proceedings in nature of appeals are of three kinds; 1. A writ of attain; 2. The writ of deceit; and, 3. A writ of error.

1. A writ of attain lies to enquire whether a verdict given by a jury of twelve men be false; if so, that the judgment therein may be reversed; and this, by the Common Law, must be brought in the life-time of him in whose favour the verdict was given, and of two of the jurors who gave it. The jury that are to try this false verdict must be twenty-four, and are called the Grand Jury: and he who brings the attain, can bring no other evidence than was originally brought before the former jury: but those, against whom it is brought, are allowed to produce new matter; as the petit jury might have formed their verdict of their own knowledge which never appeared in court. If the grand jury found the verdict a false one, the judgment by the Common Law was, that the jurors should become for ever infamous; should forfeit their goods and the profits of their lands; should themselves be imprisoned, and their wives and children thrown out of doors; should have their houses rased, their trees extirpated, and their meadows ploughed; and that the plaintiff should be restored to all that he had lost on account of the unjust verdict: but, by 13 Eliz. c. 25. enforcing former statutes, an attain is allowed to be brought after the death of the party, and more moderate punishment is inflicted, *viz.* perpetual infamy, and if the cause of action were above forty pounds value, a forfeiture of twenty pounds a piece by the jurors;



jurors; or if under forty pounds, then five pounds a-piece, to be divided between the King and the party injured. So that a man may now bring an attain, either upon the Statutes or at Common Law, as he pleases, and in both of them may reverse the judgment: but the practice of granting new trials has superseded the use of both these attainments.

2. An action on the case, in the nature of a writ of deceit, may be brought in the court of Common Pleas, to reverse a judgment there had by fraud or collusion in a real action: of this, however, enough has been observed before, page 223.

3. But the principal redress on these occasions, is by a writ of error to some superior court of appeal. He that brings the writ must generally find substantial bail as a security to prosecute, and for securing payment of costs and damages in a case of non-success. To what courts appeals will lie, has been already shewn in treating of the several courts of justice; all that is necessary to observe here is, that each court of appeal may, on hearing the matter, reverse or affirm the judgment of the inferior courts, but none are final except the House of Peers.

III. If judgment be not suspended or arrested by any of the methods before-mentioned, the last step is carrying that judgment into execution. Now execution is performed in different ways, according to the natures of the action and judgment.

If possession of land be awarded to the plaintiff by judgment, a writ issues to the sheriff commanding him to give the plaintiff actual possession; in the execution of which, he may, with the *posse comitatus* or power of the county, justly breaking open doors, if necessary; but if possession be quietly yielded up, the delivery of a twig or a turf in the name of possession, is sufficient execution. On the recovery of a presentation to a benefice the execution is by a writ directed to the bishop or archbishop, requiring him to admit and institute the plaintiff's clerk.

In other judgments, where something is to be done by the defendant, a special writ of execution issues to the sheriff to see it done. In cases of nuisance or indictment, the sheriff is to see them removed at the charge of the defendant. On a replevin, the distress is to be returned, but if the distress be not forthcoming, the party must either submit to a fine, pay damages, or be imprisoned. In detinue after



judgment, the defendant shall be compelled to deliver the goods, or pay the value, by repeated distresses of his chattels.

Executions, in actions where money only is recovered, as a debt or damages, are against the body, lands, and goods of the defendant.

1. The debtor may be imprisoned till satisfaction be made for debt, costs, and damages, unless such debtor be a privileged person, an executor or administrator, or such other person as could not originally be held to bail: if an action be brought against the husband and wife, in execution, both of them shall be taken into custody; but if brought only against the wife, when single, and she marries during the suit, she only shall be taken. But if judgment be recovered against a husband and wife, for the contract of the wife or her personal misbehaviour during coverture, the husband only shall be imprisoned.

When a man's person is once taken in execution, he cannot regain his liberty till he makes satisfaction; and no other process can be sued out against his lands or goods; only, if the defendant dies while in confinement, the plaintiff may, after his death, sue out a new execution against his lands, goods, or chattels. When a man is imprisoned on this account, if the keeper suffers him to go at large, (though for a time only, *Dalt. c. 159.*) he can never retake him (though the plaintiff may) and the sheriff is bound to pay the debt: but if he escapes without the keeper's knowledge, provided the sheriff can retake him before any action be brought against the sheriff, he shall not be obliged to pay the debt. A rescue of a prisoner in execution will not exempt the sheriff. But, by 32 Geo. II. c. 28. if a defendant, charged in execution for any debt less than one hundred pounds, will surrender all his effects to his creditors (except his apparel, bedding, and tools of his trade, not amounting in the whole to the value of ten pounds) and will make oath of his punctual compliance with the statutes, the prisoner may be discharged, unless the creditor insists on detaining him; in which case he shall allow him two shillings and four pence *per week*, to be paid on the first day of each week, and on failure of regular payment the prisoner shall be discharged. Yet the creditor may, at any future time, have execution against the lands and goods of the defendant, though never more against his person. And on the other hand, the creditors may, as in case of bankruptcy, compel (under pain of transportation for seven years) such debtor charged in execution for any debt under an hundred pounds to make a discovery and  
surrender



surrender of all his effects for their benefit; whereupon he is also entitled to the discharge of his person.

If the defendant cannot be found, the plaintiff may sue out a process against the bail, if any were given; and in case satisfaction is not made, and the defendant does not surrender on the day of the return, the plaintiff may have judgment against the bail, and execution against them.

2. Execution may also be had against the defendant's goods and chattels, and herein privileged persons are no more exempt, than others, nor executors or administrators, with regard to the goods of the deceased. The sheriff may not break open any outer doors to execute his writ on either the goods or the person of the defendant; but must enter peaceably; and may then break open any inner door belonging to the defendant, in order to seize the goods and chattels. These he may sell (even an estate for years, which is a real chattel) till he has raised enough to satisfy the judgment and costs; first paying the landlord of the premises on which the goods are found, the arrears of rent then due, not exceeding one year's rent in the whole. If part of the debt only be recovered this way, the plaintiff may take the defendant's body for the remainder.

3. Execution will lie also against a man's goods and the profits of his lands; whereby the sheriff may seize all his goods, and receive the rents and profits of his lands till satisfaction be made to the plaintiff. Where execution is to go against an ecclesiastic, who has no lay-fee, but is beneficed, a writ is sent to the bishop of the diocese, who thereupon sequesters the profits of his living, and directs the churchwardens to collect the same, and pay them to the plaintiff till the full sum be raised. In short, by Common Law, a man's body and goods, may by certain writs be taken in execution, upon any judgment, so may his land and goods, but not his body and land. But upon some prosecutions given by statute, as in the case of recognizances or debts acknowledged on statutes merchant or statutes staple; upon forfeiture of these, the body, lands, and goods may all be taken in execution at once to compel the payment. For a debt due to the King, execution on judgment may be sued out against body, goods, and land, and the King's debt shall, in suing out execution, be paid in preference to that of any other creditor who hath not obtained judgment, before the King's suit commenced. The King's judgment also affects  
all



all lands, which the King's debtor hath at or after the time of contracting his debt, or which any of his officers mentioned in 13 Eliz. c. 4. hath at or after the time of entering on his office : so that if such officer of the crown, *bona fide*, sells his land for its value, that land, even in the possession of the purchaser, shall be liable to the King's debt ; though the debt due to the King was contracted by the vendor many years after the sale of his lands : whereas between subject and subject, a judgment by 29 Car. II. c. 3. shall not bind land in the hands of a *bona fide* purchaser, but only from the time of actually signing the same ; nor goods in the hands of a stranger or purchaser, but only from the actual delivery of the writ to the sheriff. But all writs of execution must be sued out within a year and a day after the judgment is entered, or the court will conclude that the judgment is satisfied and extinct. Yet however the judgment may be revived, or the plaintiff may still bring an action of debt founded on this dormant judgment.

There is also a trial by battle, which the defendant in a writ of right may at this day demand ; and which will be hereafter described.

#### C H A P. VI.

#### OF PROCEEDINGS IN THE COURTS OF EQUITY.

HAVING gone through that redress of wrongs afforded by the Common Law courts, we have now to consider the proceedings in equity : of which I shall endeavour to give the reader some general idea, without entering into all the *minutiae* of practice. I have had occasion to speak of the court of Chancery already, p. 199. sect. vii. but not so fully as I mean now to do. The same jurisdiction is exercised, and the same system of redress pursued in the equity court of Exchequer ; with a distinction however in some cases, peculiar to each, and in which the other courts interfere.

The only distinction between the courts of Equity and the courts of Common Law, are in the mode of proof, the mode of trial, and the mode of relief. A court of equity obliges the parties to answer upon oath ; and will admit of evidence by deposition taken in writing ; so that the attendance of witnesses in court is excused, and with re-  
spect



spect to relief, it is more specific, than is given in the courts of Common Law. In executing agreements, a court of equity will compel them to be carried into strict execution, where it is not improper or impossible, instead of giving damages for their non-performance. In waste and other similar injuries, equity will order them to be prevented by injunction; it will stop proceedings of law; it will set aside fraudulent deeds, decree re-conveyances, and direct an absolute conveyance merely to stand as a security. In such matters only lies the distinction between courts of Equity and courts of Common Law. In all other respects they are the same; it being a maxim that equity follows the law, and by no means rests in the breast of the Chancellor.

The commencement of a suit in Chancery, is by bill to the Chancellor in the form of a petition, praying that he will compel the defendant to answer upon oath, to all the matter charged in the bill; and if it be to stop proceedings at law, to prevent waste and the like, it prays that he will issue an injunction, commanding the defendant to cease.

This bill or petition must first be examined and signed by counsel, as it must contain nothing scandalous or impertinent; if it does, the defendant may refuse to answer it, till the objectionable matter is expunged; which is done by referring it to a master in Chancery; (of whom there are twelve in number, including the Master of the Rolls) if he report it scandalous or impertinent, such matter must be struck out, and the defendant shall have his costs.

When the bill is filed in the Six Clerks Office, where an injunction is prayed for, upon a proper case supported by affidavits, it is generally granted, and to continue till the defendant has put in his answer; which is to be done upon oath: but, if a peer or peeress answers, it is only upon their honour; and when the answer comes in, whether the injunction shall continue or not till the hearing of the cause, is determined by the court upon argument of counsel drawn from considering the answer and affidavit together.

But in common bills, as soon as they are filed, a writ of *subpoena* is taken out, commanding the defendant to appear and answer the bill within a limited time, on pain of one hundred pounds. If this is not done, an attachment issues to the sheriff to take him into custody, and bring him into court. If he is not to be found, the sheriff is directed



directed to cause public proclamation to be made throughout the county, summoning him to appear. If he does not appear after this, a commission of rebellion is awarded against him, for disobedience to the King, who is supposed to sit in this court; and four commissioners are therein named, any of whom are ordered to take him up any where in Great Britain: if he does not appear after this, the court sends a serjeant at arms in search for him, and if not found, a sequestration issues to seize all his personal estate, and the profits of his real, and detain them, subject to the order of the court; this done, the plaintiff's bill is supposed to be admitted by the defendant, and a decree is made accordingly.

Should the defendant be taken, he is committed to prison, till he obeys the orders of the court, for which he is attached, and pays the plaintiff such costs as he has thus incurred.

As a body corporate cannot be attached, the process is to distrein their goods and chattels, rents and profits, till they obey. If a peer be the defendant, the Lord Chancellor sends a letter to him to request his attendance, together with a copy of the bill: and if he neglects to appear, he may then be served with a *subpœna*, which is followed, if on further contempt, with a sequestration against his lands and goods. These same process issues against a member of parliament, except that the Lord Chancellor sends him no letter.

If the defendant absconds, and cannot be served with a *subpœna*, by 5 Geo. II. c. 25. a day shall be appointed him to appear to the bill, which is to be inserted in the Gazette, read in the parish church where the defendant last lived, and fixed up at the Royal Exchange; and if the defendant doth not appear upon that day, the bill shall be taken *pro confesso*, that is, as allowed by the defendant.

But should the defendant appear, if he cannot set aside the bill, by any plea in bar, he must answer it on oath, if the plaintiff requires it; but this is not always done: but should any questions be asked in the bill that seeks discovery of any thing which may occasion a forfeiture of any kind, or may convict a man of any crime, the defendant may demur to the bill, and refuse to answer. If the defendant lives within twenty miles of London he must be sworn before a master in Chancery, if at greater distance, a commission will be granted to commissioners to take his answer on oath in the country. In this answer the defendant can pray only to be dismissed the court: if he has any  
thing



thing to pray against the plaintiff, he must do it by a bill of his own, called a cross bill.

If the plaintiff finds in the defendant's answer sufficient matter to proceed on, he may go on to a hearing by proving his facts, which is done by the examination of witnesses, and taking down their depositions in writing. Witnesses also in the country and abroad, may be examined upon oath by commissioners there appointed; and it hath been held that the deposition of a heathen who believes in the Supreme Being, taken in the most solemn manner according to the customs of his own country, may be read in evidence. And witnesses are compellable to appear and submit to such examination.

If witnesses are old or in a bad state of health, it is very usual to file a bill, to preserve the testimony of such witnesses, though no suit is depending; for persons may wait the death of such people to begin their suit. This generally happens in the case of wills, and is called proving a will in Chancery.

When all the witnesses are examined, copies of their depositions may be had by all parties, and the cause when ready for hearing, may be brought on either before the Chancellor or the Master of the Rolls: and it is declared by 3 Geo. III. c. 30. That all orders and decrees made by the Master of the Rolls, except such as by the course of the court were appropriated to the great seal alone, shall be valid; subject nevertheless to be discharged or altered by the Lord Chancellor, and so as they shall not be inrolled, till the same are signed by his lordship. Either party may be *subpœna'd* to hear judgment on the day fixed for the hearing, when, if the plaintiff does not attend, his bill is dismissed or thrown out with costs; or if the defendant does not attend, a decree will be made against him, which will be final, unless he pays the plaintiff's costs of attendance, and shews good cause for his non-attendance. A plaintiff's bill may also be dismissed, on a nonsuit at law, if he suffers three terms to elapse without making some progress in the cause.

Where there are cross causes by cross bills, they are generally contrived to be heard at the same time. Hearings are thus conducted. The plaintiff's bill is first read and spoken to by his counsel, and the depositions in favour of it, or any part of the defendant's answer, as the plaintiff may call for, are read by the clerks. This done, the counsel for the plaintiff make their observations and arguments; then



the defendant's counsel do the same for him; except that they may not read any part of his answer; and the counsel for the plaintiff are heard in reply. No depositions of witnesses for either plaintiff or defendant are read, that are any way interested in the decree. When the court has heard all parties, it pronounces the decree.

Costs do not here follow the decree, as they do judgments in Common Law, of course; but are given discretionally, as the circumstances of the case appear more or less favourable to the vanquished party.

If in the course of the hearing, any question of law arises upon the cause, it is submitted by reference to the decision of the judges of the courts of King's Bench or Common Pleas, before whom it is solemnly argued by counsel on both sides.

All accounts and intricacies are referred on the first hearing (for there is generally more than one) to a master in Chancery to examine; which examination frequently lasts for years, and such master reports to the court the facts as they appear to him. Hence it is that Chancery suits are often of so long duration.

When a final decree is made, it is enforced, if necessary, by a commitment of the person, or a sequestration of the party's estate; but if by this decree either party thinks himself aggrieved, and it is not inrolled, he may by petition to the Chancellor, signed by two counsel, have a re-hearing, when even new evidence may be read; but after the decree is once signed and inrolled, no re-hearing can be had, except by bill of review or appeal to the House of Lords.

A bill of review may be had on a manifest error in judgment's appearing on the face of the decree, or, with leave of the court, where new evidence comes out, that could not possibly be had at the time the decree was made; but not otherwise.

An appeal to the House of Lords is by petition; but no new evidence is there admitted. On hearing the former evidence, they either affirm or reverse the decree. This is the *dernier resort*.

A VIEW



# A VIEW OF THE LAW.

## B O O K IV.

### ON PUBLIC INJURIES.

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#### C H A P. I.

#### OF CRIMES AND CRIMINALS IN GENERAL.

**I**N treating of crimes and misdemeanors, we will consider their nature, with the ways of preventing and punishing them; who are exempted from punishment in criminal cases; the several degrees of guilt in criminals; the different species of crimes, with their punishments; and the method of inflicting these punishments: and the first three we will treat of in this chapter.

Such a knowledge of the criminal law as we are now going to lay before the reader, that is, the nature, extent, and degrees of every crime, with the penalties annexed, is of the greatest importance to every individual; for such is the instability of human things; so prevalent are the vices of some and so ungovernable the passions of others; that no situation in life, no integrity of heart, or circumspection of conduct, should place a man above considering what is forbidden by the laws of his country, and to what deplorable circumstances a wilful disobedience may expose him.

I. A crime then, or misdemeanor, is the commission or omission of an act, in opposition to a public law, either forbidding or enjoining it. In common use of the words, crimes denote great offences; misdemeanors, faults, and omissions.

Punishments are evils inflicted by human laws for disobedience in such regulations, as are ordained for the good of the community; not by way of expiation for the crime committed, but as a precaution



against future offences of the same kind, either by correcting or amending the offender, for which all private corporal punishments, fines, imprisonment, and banishment are inflicted; or by deterring others by the dread of his example; for which all ignominious public punishments were established; or by taking from the criminal the power of doing future mischief: which is done by depriving him of life, or condemning him to perpetual confinement, slavery, or exile.

II. For the commission of acts for which some persons would be punished, there are others exempted, *viz.* 1. Those who commit them involuntarily; or without any vitious or malicious design; for example, idiots, lunatics, and infants. 2. Those who commit them by accident; and, 3. Those who commit them through necessity or compulsion. We will enter more minutely into each.

1. Infants, under the age of discretion, must be ignorant of any crime they commit, of course cannot be deserving of punishment. But what is this age of discretion? The law of England does in some cases privilege a minor under the age of twenty-one, as to common misdemeanors; so as to escape fine, imprisonment, and the like; and particularly in cases of omission, not repairing bridges, highways, &c. not having his fortune at command, he is supposed incapable of doing as he would; but in riots, battery, and breaches of the peace, a minor, above the age of fourteen, is as liable to suffer as a person of twenty-one.

With respect to capital crimes, the capacity of doing ill is not so much measured by a boy's age, as by his understanding; one of eleven years of age has often as much cunning as one of fourteen; and in these cases the maxim is, that cunning shall compensate for want of years. Under seven years of age, an infant cannot be guilty of felony; but at eight he may: and if it shall appear to a jury that an infant under fourteen is capable of discerning good from evil, he may be convicted and suffer death. A girl of thirteen has been burnt for killing her mistress; and one boy of ten and another of nine who had killed their companions, were adjudged to die, and the one of ten was hanged; because it appeared on their trials, that the one hid, himself, and the other the body he had killed; which declared a consciousness of guilt, and a discretion to see right from wrong. Nay in the last century, a boy of eight years old was hanged at Abingdon, for



for firing two barns; it appearing on his trial that he had malice, revenge, and cunning.

Lunatics and idiots are excused from the guilt of crimes, as not knowing what they are about. If a man in sound mind commits a capital offence, and before arraignment loses his senses, he shall not be arraigned; because not able to plead in his own behalf; nay, if he becomes mad after he is found guilty, and condemned, execution shall be stayed; as, was he not insane, he might alledge something in stay of execution: besides the execution of a madman would be no example to others. If there be any doubt whether the criminal be insane or not, it shall be tried by a jury; but a lunatic with lucid intervals shall answer for what he does in those intervals, as if he had no deficiency. And if a person who wants discretion, commit a trespass against the person or possession of another, he shall be compelled in a civil action to give satisfaction for it. Though lunatics and idiots are not punishable by any criminal prosecution, he who incites a madman to commit murder or other crime, is a principal offender, and as much punishable as if he had done it himself. 1 *Harw.* 2. An idiot cannot bring an appeal: 1 *Harw.* 162. neither can he be an approver. 3 *Inst.* 129.

Drunkenness has been looked upon as temporary madness; but this will be no excuse for criminal conduct; the law considering it rather as an aggravation of the offence than otherwise.

2. Those who commit unlawful acts by accident are always acquitted of any guilt. Where it affects the life, we shall speak of it hereafter; but in other matters, where any accidental mischief happens to be the consequence of a *lawful* act, the party is excused; but if he be doing an *unlawful* act, and should chance to kill a man or the like, in so doing, his want of foresight shall not exempt him from punishment.

Ignorance or mistake falls also under this head: that is, when a man intending to do a lawful act, commits one that is unlawful. If this arise from ignorance or mistake of fact, he stands excused; but not so, if from error in point of law. If a man designing to kill a housebreaker, in his own house, by mistake kills one of his own family, he is not criminal; but if he thinks he has a right to kill an outlaw, and does it, it is murder: for the laws of one's country every one is bound, and presumed, to know.

3. Such



3. Such as commit unlawful acts through necessity or compulsion are also excused: as when a legislature establishes iniquity by law, and commands the subject to do an act contrary to religion and morality; however it might be condemned by divines, by municipal law, he would stand guiltless. The sheriff who burnt the bishops in the reign of Queen Mary, was not liable to punishment from Elizabeth; being justified by that power that laboured to restore superstition under the auspices of its merciless sister, persecution.

So in private relations: for some crimes that a woman commits under the constraint of her husband, she shall stand excused. But neither a son nor a servant can plead the command or compulsion of a parent or master. If a woman commit theft, burglary, or other civil offences by the command of her husband, or even in his company, which the law supposes a command, she will not be deemed acting of her own will, and of course will escape punishment. But no plea of a husband's command shall excuse a woman guilty of treason or murder. And a wife may be indicted and set in the pillory with her husband for keeping a brothel, being an offence generally conducted by the intrigues of the female sex: and in all cases where a wife acts singly, without the company or coercion of her husband, she is as much responsible for her actions as if she was a single woman.

In time of war and rebellion, a man is justified in doing many treasonable acts by compulsion of the enemy and rebels; which in time of peace would admit of no excuse. But this will hold good only in human laws. According to divine law no compulsion should make a man do an immoral act: and therefore, though a man could not escape even death but by killing an innocent man; this fear, in the eye of heaven, would not acquit him of murder; for he ought rather to forfeit his own life than take away that of an innocent person. In such a case he might kill the assailant, and herein would he be justified. This argument will have more weight in crimes of less degree than that of taking away the life of another; but if it is at all justifiable to do an unwarrantable act through fear, that fear at least should be just and well grounded.

So again, there are instances where, in the commission of acts, a man's will is rather passive than active; as where, in the choice of two evils set before him, and compelled to adopt one, he chooses the least pernicious. For example; where a man is obliged to wound or  
kill



kill another, when resistance is made to the execution of his office: as in taking up a capital offender; or dispersing a riot. His office and the good of society here will justify the act, and bear him harmless.

III. Next, for the several degrees of guilt in criminals. In the commission then of a crime, a man may be either *principal* or *accessory*.

1. As principal, whether committing the fact, or the being present and assisting when it is done. Being present does not always imply being in the sight or hearing of, but a man is deemed to be present, if, while another is committing a robbery, he keeps watch at a proper distance. So, in the case of murder by poisoning. If a man prepares and lays the poison; or persuades another to drink it, who is ignorant of its poisonous quality; or gives it to him for that purpose, he is as much a principal in the murder, as if he had administered the potion, and was present when it was drank. So, laying a trap for another; letting out a wild beast with an intent to do mischief; exciting a madman to commit murder, of which death is the consequence: in all these cases the party offending is a principal.

2. An accessory is one who is either *before* or *after* the crime committed some way concerned in it, though he should neither be the chief actor, nor be present when it was done. Let us see then what offences admit of accessories *before* the fact and *after* it, and how they are to be treated.

In high treason all are deemed principals, on account of the enormity of the crime: but in petit treason, murder, and felonies of all sorts there may be accessories, except in those offences that are suddenly committed, as manslaughter and the like, which of course can have no accessories *before* the fact. In crimes under the degree of felony, the law deems all that are concerned therein principals. An accessory, however, cannot be guilty of a higher crime than his principal. For example: if a servant instigates a stranger to kill his master, the servant, though an accessory, is equally with the stranger guilty of murder: but if the servant be present when he is killed, he will be a principal; of course guilty of petit treason, and the stranger will be guilty of murder.

An accessory *before* the fact, is one who, though absent at the commission of a crime, doth procure, counsel, or command another to commit it. If *A* advises *B* to kill or rob another, and *B* does it in the absence of *A*, *B* is principal in the murder or robbery, and *A* is accessory.



accessory. If *A*, the reputed father, advises *B*, the mother of a bastard child, unborn, to strangle it when born, and *B* does it, *A* is accessory to this murder. He who any ways commands or advises another to commit an unlawful act, is accessory to all the consequences of that act; but not to any act distinct from the act he advised him to commit. For instance, if *A* advises *B* to beat *C*, and *B* beats him so that he dies, *B* is guilty of murder, and *A* as accessory: but if *A* commands *B* to burn *C*'s house, and *B*, in so doing, robs it; *A*, though accessory to the burning, is not accessory to the robbery. But if the felony committed be of the same nature, only varying in circumstances; as if *A* commands *B* to poison *C*, and *B* stabs him or shoots him, *A* is still accessory, the nature of the thing commanded being the death of *C*, though the manner or circumstances of its execution varied.

If a man counsels or commands another to kill a person, and before the crime be committed, repents and countermands it, and yet he kills him; such person countermanding shall not be adjudged an accessory. *Dalt. c. 161.*

In all cases where an act of parliament enacts an offence to be felony, though it mention nothing of accessories before or after, yet virtually and consequentially, those that counsel or command the offence, are accessories before, and those that knowingly receive the offender are accessories after: but, where the statutes expressly mention only procurers, counsellors, or abettors; that is, accessories before, accessories after are not included. 1 *H. H. 614.*

Statutes excluding the principals from the benefit of clergy, do not thereby exclude the accessories before or after; neither doth a statute excluding accessories, thereby exclude the principals. 2 *Haw. 342.*

An accessory *after* the fact, is when a person knowing a felony to have been committed, receives, relieves, and shelters the felon. Any assistance given to prevent the felon's being apprehended, tried, or punished, makes the assister an accessory; as furnishing a means to escape, giving him victuals or money to support him; finding him a place of shelter; protecting or rescuing him, or conveying instruments to enable him to break out of prison. But relieving him in prison with cloaths and other necessaries is no offence. Buyers or Receivers of stolen goods, knowing them to be stolen, are also accessories, and may be



be transported for fourteen years; and buying goods at an undervalue is a presumptive evidence, that they were known to be stolen. 1 *H. H.* 619. Receiving of linen stolen from bleaching grounds is a capital offence.

If one commit a felony, and come to a person's house before he be arrested, and such person suffer him to escape without arrest, knowing him to have committed a felony, this doth not make him accessory; but if he take money of the felon to suffer him to escape, this makes him accessory: and so it is, if he shuts the fore door of his house, whereby the pursuers are deceived, and the felon hath opportunity to escape, this makes him an accessory; it not being the omission to apprehend him, but his assisting to the escape that constitutes the crime. 1 *H. H.* 619.

But the felony must be complete at the time of the assistance given, or the assistant is not an accessory. If *A* wounds *B* mortally, and after the wound given, but before *B* dies, *C* receives and shelters *A*; *C* is not accessory; for till *B* dies, no felony is committed: but where a felony is complete, so strict is the law to do effectual justice; that if a parent receives and assists his child, or a child his parent, or even if the husband relieves his wife, who have either of them committed felony, the receivers become accessories *after* the fact. But a married woman concealing her husband does not become an accessory by so doing, she being bound not to discover her lord.

If a wife alone, the husband being ignorant of it, receives a felon, the wife is accessory and not the husband; but if the husband and wife both receive him knowingly, it shall be adjudged only the act of the husband, and the wife shall be acquitted. 1 *H. H.* 621.

Accessories *after* the fact are allowed the benefit of clergy (which the reader will find explained hereafter) in all cases, except in horse-stealing and stealing linen from bleaching grounds, which is denied to principals and accessories *before* the fact in many cases, as, among others, in petit treason, murder, robbery, and wilful burning. It is doubted whether, if a man be acquitted as principal, he can be afterwards indicted as an accessory *before* the fact; these offences being so nearly allied in guilt; but it is clearly held that one acquitted as principal, may be indicted as an accessory *after* the fact, this being a species of guilt so very different.



## CHAP. II.

## OF THE DIFFERENT SPECIES OF CRIMES.

**I**N every well-ordered society, crimes are estimated in proportion to the mischief they do; of course private vices, or the breach of mere absolute duties, are not the objects of municipal law, any further than as they tend, by their bad example, to corrupt the morals of the public, and become thus a species of public crimes. Drunkenness, for instance, if committed privately, is beyond the reach of human laws, but if committed publicly, its bad example makes it liable to temporal censures: and yet drunkenness is in itself a vice in *foro conscientiae*, as thoroughly criminal, whether it be committed in private or in public.

On the other hand, there are some misdemeanors punishable by the laws of the land, that are not in themselves criminal; but are made unlawful for the benefit of the public, such as poaching, exportation of wool, and the like. These are no otherwise criminal than by disobeying the supreme power: however, we must treat of them all here as crimes, and deriving their guilt from the law of man.

In ranging the several offences, then, punishable by the laws of this country, I will begin with those more immediately levelled at God and religion: I will then proceed to such as violate the law of nations; next, to those that strike at the King and his government; then to such as infringe the rights of the public; and, lastly, to those which injure individuals.

I. First then for those crimes or misdemeanors more immediately levelled at God and religion, and of these there are eleven; *viz.* 1. Apostasy; 2. Heresy; 3. Reviling of ordinances; 4. Nonconformity; 5. Blasphemy; 6. Swearing; 7. Religious impositions; 8. Simony; 9. Sabbath-breaking; 10. Drunkenness; and, 11. Lewdness. The first four are more immediately levelled at the established religion, the rest at God and morality.

1. First, then for apostasy, which is a total renunciation of Christianity, by embracing either a false religion or no religion at all. Abstracted from its own intrinsic truth, the preservation of Christianity,



as a national religion, is of the utmost consequence to a civil state. Revealed religion is the grand foundation of all judicial oaths; of course, all moral evidence must be injured by apostasy, and overthrown by infidelity; hence all affronts to Christianity are highly deserving of censure. To this end it is enacted, by 9 & 10 W. III. c. 32. That if any person educated in, or having made profession of, the Christian religion, shall by writing, printing, teaching, or advised speaking, deny the Christian religion to be true, or the holy scriptures to be of divine authority, he shall upon the first offence be rendered incapable to hold any office or place of trust; and for the second, be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and shall suffer three years imprisonment without bail; but to give room for repentance, if, within four months after the first conviction, the delinquent will in open court publicly renounce his error, he shall be discharged for that once from all his disabilities.

2. A second offence of this kind is heresy: which consists of a denial of some of the essential doctrines of Christianity, and which is liable to the censures of the ecclesiastical courts; but the legislature hath so far interposed, with respect to one species of heresy, as to declare by 9 & 10 W. III. c. 32. That if any person educated in the Christian religion, or professing the same, shall by writing, printing, teaching, or advised speaking, deny any one of the persons in the holy Trinity to be God, or maintain that there are more Gods than one, he shall undergo the same penalties and incapacities, as was before mentioned for the crime against apostasy: but the information must be given to a justice of the peace within four days after the words spoken, and the prosecution of such offence must be within three months after such information.

3. Reviling the ordinances of the church is a third offence against religion. By 1 Edw. VI. c. 1. and 1 Eliz. c. 1. & 2. whoever reviles the sacrament of the Lord's supper, shall be punished by fine and imprisonment; and if any minister shall speak any thing in derogation of the Book of Common Prayer, he shall, if not beneficed, be imprisoned one year for the first offence, and for life for the second: and if he be beneficed, he shall for the first offence be imprisoned six months, and forfeit a year's value of his benefice; for the second offence he shall be deprived, and suffer one year's imprisonment, and for the



third, shall in like manner be deprived, and suffer imprisonment for life. And if any person in plays, songs, or other open words speak any thing in derogation, depraving, or despising of the said book, or shall openly prevent the reading of it, or cause any other service to be used in its stead, he shall forfeit for the first offence a hundred marks; for the second, four hundred; and for the third shall forfeit all his goods and chattels, and suffer imprisonment for life.

Also seditious words, in derogation of the established religion, are indictable, as tending to a breach of the peace. 1 *Haw.* 17. By 1 W. & M. sess. 1. c. 18. s. 7. No person shall have any benefit of the toleration act, who shall deny, in his preaching or writing, the doctrine of the blessed Trinity, as it is set forth in the thirty-nine articles: and by 3 Jac. I. c. 21. If any person shall in any stage-play, interlude, shew, may-game, or pageant, jestingly or profanely speak or use the holy name of God or of Christ Jesus, or of the Holy Ghost, or of the Trinity; he shall forfeit ten pounds, half to the King and half to him that shall sue.

4. Nonconformity to the worship of the church of England, is another offence, or rather it is a negative branch of the last; nonconformists are of two sorts: those who absent themselves from divine service, and attend the service of no other persuasion; and those who offend through a mistaken or perverse zeal, as papists and dissenters. The first, by 1 Eliz. c. 2. 23 Eliz. c. 1. & 3 Jac. I. c. 4. & 5. forfeit one shilling to the poor every Sunday they so absent themselves, and twenty pounds to the King, if they absent for a month together; and if they absent from their own parish church, they shall prove where they go to church. 1 *Haw.* 13. And if they keep an inmate in their houses so irreligiously disposed, they forfeit ten pounds a month. With respect to protestant dissenters; no penal laws made against popish recusants (except the test acts) shall extend to any dissenters, other than papists, and such as deny the Trinity: provided, 1. That they take the oaths of allegiance, and supremacy (or being Quakers make a similar affirmation) and subscribe the declaration against popery; 2. That they repair to some congregation certified to and registered in the court of the bishop or archdeacon, or at the county sessions; 3. That the doors of such meeting-houses shall be unlocked, unbarred, and unbolted; in default of which the persons meeting there are still liable to all the penalties of the former acts. Dissenting teachers,



teachers, in order to be exempted from the penalties of the statutes 13 & 14 Car. II. c. 4. 17 ar. II. c. 2. & 22 Car. II. c. 1. are also to subscribe the articles of religion mentioned in 13 Eliz. c. 12. (which concern only the confession of the true Christian faith and the doctrine of the sacraments) with an express exception of those relating to the government and powers of the church, and to infant baptism. Thus all persons, except papists and opposers of the Trinity, are at full liberty to act according to their own consciences in matters of religious worship. And it is also enacted by 1 W. & M. st. 1. c. 18. That if any person shall wilfully, maliciously, or contemptuously disturb any congregation assembled in any church or permitted meeting-house, or shall misuse any preacher or teacher there, he shall be bound over to the sessions of the peace, and forfeit twenty pounds. But by 5 Geo. I. c. 4. no mayor or principal magistrate must appear at any dissenting meeting with the ensigns of his office, on pain of disability to hold that or any other office; and by 13 & 14 Car. II. c. 4. & 17 Car. II. c. 2. no persons shall teach school, unless licensed by the ordinary, and unless they subscribe a declaration of conformity to the church of England, and reverently frequent divine service established by the laws of this kingdom.

The laws in force against the papists are many.

Persons professing the Roman Catholic religion, besides the former penalties for not frequenting the parish church, are disabled from taking any lands either by descent or purchase, after twenty-one years of age, unless they take the oath of allegiance and supremacy, as specified in an act of 18 Geo. III. They must at the age of twenty-one register their estates before acquired, and all future conveyances and wills relating to them; they are incapable of presenting to any church living, or granting to any other person any avoidance of the same; and they may not keep or teach any school, under pain of perpetual imprisonment, unless they first take the oath prescribed in the said 18 Geo. III.

And if they voluntarily hear or say mass, without having first taken the oath above-mentioned, they forfeit; the one two hundred, the other one hundred marks, and each shall suffer one year's imprisonment. If any person sends another abroad to be educated in the popish religion, or contributes to his maintenance when there, both the persons sending, sent, and contributing, are disabled to sue either  
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in law or equity, to be either an executor or administrator; or to enjoy any legacy or deed of gift, or to bear any office in the realm, and shall forfeit all their goods and chattels, and all their real estates for life. Nay, it is high treason should these errors be aggravated by apostasy or perversion; that is, where a person is reconciled to the see of Rome, or procures the reconciliation of others.

Popish recusants, convicted in a court of law, of not attending the service of the church of England, besides the penalties, &c. above-mentioned, are considered as excommunicated; can hold no office or employment; if they keep arms in their houses, such arms may be seized by a justice of the peace; they may not come within ten miles of London, under the penalty of one hundred pounds; cannot sue either in law or equity; may not travel five miles from home, except by licence, on pain of forfeiting all their goods, and may not appear at court on pain of one hundred pounds. No marriage or burial of such recusant, or baptism of his child, shall be performed, but by the clergy of the church of England, under further heavy penalties. A married woman, when recusant, forfeits two-thirds of her jointure or dower, may not be executrix or administratrix to her husband, nor have any share of his goods; and during the coverture, may be imprisoned, unless her husband redeem her at the rate of ten pounds a month, or the third part of all his lands. All other recusants within three months after conviction, must either submit and renounce their errors, or if required by four justices must abjure, and renounce the realm, and if they do not depart, or if they return without a licence from the King, they shall suffer death. Refusing to make the declaration against popery, enjoined by 30 Car. II. st. 2. when tendered by a proper magistrate, makes the party, if he resides within ten miles of London, an absolute recusant convict, or, if at a greater distance, suspends him from having any seat in parliament, keeping arms in his house, or any horse above the value of five pounds.

To be a *recusant*, doth not necessarily imply the being a *papist*; but a *recusant* is any person, who refuses to go to church, and worship God after the manner of the church of England: a *popish recusant* is a papist who so refuses, and a *popish recusant convict* is a papist legally convicted thereof. *Burn. Popery.*

Popish bishops or priests celebrating mass, or exercising any part of their functions in England, except in the houses of ambassadors, are liable



liable to perpetual imprisonment, unless they have before taken and subscribed the above-mentioned oath set forth in 18 Geo. III. And further, any popish priest born in the dominions of the crown of England, who shall come over hither from beyond sea (unless driven by stress of weather, and tarrying only a reasonable time) or shall be in England three days, without conforming and taking the oaths, is guilty of high treason: and all persons harbouring him are guilty of felony, without benefit of clergy.

To secure the religion of this country against all species of nonconformists, the *corporation* and *test* acts were passed. By the corporation act, 13 Car. II. st. 2. c. 1. no person can be elected to any office relative to the government of any city or corporation, unless within a twelvemonth before, he has received the sacrament of the Lord's supper, according to the form of the church of England, and takes the oaths of allegiance and supremacy. The test act, 25 Car. II. c. 2. explained by 9 Geo. II. c. 26. enjoins all officers, civil and military, to take the oaths, and make the declaration against transubstantiation in any of the King's courts at Westminster, or at the quarter-sessions, within six calendar months after their admission, and also within the said time to receive the sacrament of the Lord's supper according to the usage of the church of England in some public church, immediately after divine service and sermon, and to deliver into court a certificate thereof, signed by the minister and churchwardens, and also to prove the same by two credible witnesses, upon forfeiture of five hundred pounds, and disability to hold the said office. Of the same kind is the 7 Jac. I. c. 2. which permits no persons to be naturalized or restored in blood, but such as undergo a like test.

5. The following offences are levelled more immediately against God; the former were rather attacks upon religion. Of these the first is blasphemy; denying the being and providence of the Almighty, or contumeliously reproaching our blessed Saviour; also profane scoffing at scripture, and exposing it to contempt and ridicule. These are offences punishable at Common Law by fine and imprisonment, or other infamous corporal punishment.

6. The next offence is common swearing, respecting which the 19 Geo. II. c. 21, enacts, That every labourer, sailor, or soldier profanely cursing or swearing, shall forfeit one shilling, every other person under the degree of a gentleman two shillings, and every gentleman or  
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person of superior rank five shillings, to the poor of the parish; and on a second conviction, double, and for every subsequent offence, treble the sum first forfeited; with all charges of conviction; and in default of payment shall be sent to the house of correction for ten days. Any justice of the peace may convict on his own hearing, or the testimony of one witness; and any constable or peace officer upon his own hearing may secure any offender and carry him before a justice, and there convict him. If the justice omits his duty, he shall forfeit five pounds, and the constable forty shillings. And the act is to be read in all parish churches and public chapels, the Sunday after every quarter day, on pain of five pounds, to be levied by warrant from any justice. And further by 3 Jac. I. c. 21. if in any stage-play, interlude, or shew, the name of the Holy Trinity, or any of the persons therein be jestingly or profanely used, the offender shall forfeit ten pounds; one moiety to the King, and the other to the informer.

7. Religious impostors are another species of offenders; such as falsely affect to have a commission from Heaven, and frighten the people by denunciations of judgment: such are punishable in the temporal courts with fine, imprisonment, and other infamous corporal punishment.

8. Simony also may be ranked among these offences. By 31 Eliz. c. 6. if any patron, for money or any other corrupt consideration or promise, directly or indirectly given, shall present, admit, institute, install, or collate any person to an ecclesiastical benefice or dignity, both the giver and taker shall forfeit two years value of the benefice or dignity; one moiety to the King, and the other to any one who will sue for the same. If persons also corruptly resign or exchange their benefices, both the giver and taker shall in like manner forfeit double the value of the money or corrupt consideration; and persons who shall corruptly ordain or license any minister, or procure him to be ordained or licensed (which in fact is the only idea of simony) shall forfeit forty pounds, and the minister ten pounds, besides being rendered incapable of holding any ecclesiastical preferment for seven years afterwards. Corrupt elections and resignations in colleges, hospitals, and other eleemosynary corporations, are also punishable by this statute, by penalty of double the value, vacating the office, and forfeiting the right of election for that term to the crown. For other penalties attendant on simony, see page 141. f. 4.



9. Profanation of the Sabbath is punishable also by the statutes. By 27 Hen. VI. c. 5. no fair or market shall be held on the principal festivals, Good Friday, or any Sunday, except the four Sundays in harvest, on pain of forfeiting the goods exposed to sale. By 1 Car. I. c. 1. no person shall assemble, out of their own parishes, for any sport whatsoever upon a Sunday, nor in their own parishes, shall use any bull or bear baiting, interludes, plays, or other *unlawful* exercises or pastimes, on pain of forfeiting three shillings and fourpence to the poor. And by 29 Car. II. c. 7. no person is allowed to work on the Lord's day, or use any boat or barge, or expose any goods to sale; except meat in public-houses, milk at certain hours, and works of necessity or charity, on pain of five shillings; nor shall any drover, carrier, or the like, travel on Sundays, on pain of forfeiting twenty shillings.

10. By 4 Jac. I. c. 5. Drunkenness, for the first offence, is punished with a fine of five shillings, or the sitting six hours in the stocks, and to be bound over to good behaviour in a bond of ten pounds for the second; and there are many acts passed in the reign of James I. to prevent tippling, and which regulate the licensing of ale-houses.

Further, drunkenness excuses no crime; but he who is guilty of any crime whatever, through his voluntary drunkenness, shall be punished for it, as much as if he had been sober. 1 *Haw.* 2.

11. The last offence of an immoral kind I shall mention is lewdness. Frequenting houses of ill fame is indictable, and public indecency, grossly scandalous, is punishable by fine and imprisonment.

Besides what has been said of bastard children, pages 89, 90. two justices, may, by 18 Eliz. c. 3. take order for the punishment of the mother and reputed father. By 7 Jac. I. c. 4. the woman may be committed to the house of correction, there to be punished and set on work for one year; and in case of a second offence, till she find sureties never to offend again. But these punishments can only be inflicted, if the bastard becomes chargeable to the parish.

II. We are next to consider offences against the law of nations. These are of three kinds, *viz.* Violation of safe-conducts; 2. Infringement of the privileges of ambassadors; and, 3. Piracy.

1. Violation of passports granted by the King or his ambassadors in time of war to the subjects of a foreign prince, with whom we are at



war; or committing acts of hostility against those with whom we are not at war, are such breaches of public faith as every state thinks proper to punish, lest such infringements of the law of nations in individuals should involve whole countries in difficulty. To this purpose it is enacted by 31 Hen. VI. c. 4. That if any of the King's subjects attempt or offend, upon the sea, or in any part within the King's obedience, against any stranger in amity, league, or truce, or under safe-conduct; and especially by attaching his person, or spoiling him, or robbing him of his goods; the Lord Chancellor, with any of the justices of either the King's Bench or Common Pleas, may cause a full restitution and amends to be made to the party injured. And according to Sir Matthew Hale, the transgressor is guilty of high treason by the 2 Hen. V. st. 1. c. 6. though Sir William Blackstone thinks the contrary: yet, he has no doubt but he may be punished by indictment in the name of the King.

2. With respect to the rights of ambassadors, they have been treated of before, p. 42. we will observe however here, that, by 7 Ann. c. 12. all process whereby the person of any ambassador, or of his domestic servant, may be arrested, or his goods distrained or seized, shall be utterly null and void; and all persons, prosecuting, soliciting, or executing such process, being convicted by confession, or the oath of one witness before the Lord Chancellor and the chief justices, or any two of them, shall be deemed violators of the law of nations, and disturbers of the public repose; and shall suffer such penalties as the said judges, or any two of them shall think fit.

3. Piracy or robbery upon the high seas is an offence at Common Law against society, and is as much felony as a robbery committed on the highway. Some other offences are also made capital by statute. For example; by 11 & 12 W. III. c. 7. if any natural-born subject commits any act of hostility upon the high seas, against others of his Majesty's subjects, under colour of a commission from any foreign power; this, though in an alien it would be only an act of war, in a subject shall be construed piracy. And further, any commander or other seafaring person betraying his trust; and running away with any ship, boat, ordnance, ammunition, or goods; or yielding them up voluntarily to a pirate, or conspiring to do these acts; or any person assaulting the commander of a vessel to hinder him from fighting in defence of his ship, or confining him, or making  
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ing or endeavouring to make a revolt on board, shall for each of these offences be adjudged a pirate, felon, and robber, and shall suffer death; whether he be principal, or merely accessory by setting forth such pirates, or abetting them before the fact, or receiving or concealing them or their goods after it. And by 4 Geo. I. c. 11. the principals are expressly excluded from the benefit of clergy. By 8 Geo. I. c. 24. trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessels for that purpose, or in anywise consulting, combining, confederating, or corresponding with them, or forcibly boarding any merchant vessel, though without seizing or carrying her off, and destroying or throwing any of the goods overboard; shall be deemed piracy: and such accessories to piracy as are described by the 11 and 12 of W. III. are declared to be principal pirates; and all pirates convicted by virtue of this act are felons without benefit of clergy. By the above statutes also (in order to encourage the defence of trading vessels against pirates) the commanders or seamen, and the widows of such seamen as are slain in any piratical engagement, shall be entitled to a bounty, to be divided among them, not exceeding one fiftieth part of the value of the cargo on board: and such wounded seamen shall be entitled to the pension of Greenwich Hospital. And if the commander shall behave cowardly, by not defending the ship, if she carries guns or arms, or shall discharge the mariners from fighting, so that the ship falls into the hands of pirates, such commander shall forfeit all his wages, and suffer six months imprisonment. And by 18 Geo. II. c. 30. any natural-born subject or denizen, who in time of war shall commit hostilities at sea against any of his fellow subjects, or shall assist an enemy on that element, shall be construed a pirate.

III. We proceed now to those offences that strike at the King and his government, and these are of four kinds; 1. Treason; 2. Felonies injurious to the prerogative; 3. *Præmunire*; and, 4. Other misprisions and contempts.

1. First then, for treason which here is called *high* treason in contradistinction to that *petit* treason or treachery, that induces a wife to murder her husband, a servant his master, or a clergyman his bishop. High treason is the highest civil crime a man can commit, and that it may not be mistaken or misconstrued, the 25 Edw. III. c. 2. defines what offences shall be held as treason. Here then we find that



It is high treason to compass or imagine the death of the King, his Queen, or their eldest son and heir. This is construed to extend to a reigning Queen, (such as was Queen Mary and Queen Elizabeth) but the husband of such a Queen is not held to be within the meaning of the words: of course no high treason can be committed against him. By the King is also understood, the person on the throne, whether a legal king or a usurper, there being a temporary allegiance due even to a usurper for the temporary protection he affords the people. No King out of possession of the throne, however legal his claim to it may be, is entitled to our allegiance; so that should a usurper be on the throne, the subject is excused and justified in obeying and assisting him. Should a King therefore resign or abdicate the crown, no treason can be committed against him.

By compassing or imagining the death of the King, &c. is understood a design to destroy him, whether such design be carried into execution or not; of course it cannot fall under any judicial cognizance, unless it be proved by some overt or open act: the statute expressly requires it. To provide weapons or ammunition to kill the King, or to conspire to imprison him by force, and to assemble for the purpose, from a presumption that worse is intended, are sufficient overt acts of high treason. Mere words spoken by an individual, without any treasonable act or design then in agitation, are not held to amount to treason, unless such words be committed to writing, in which case, writing such words is the overt act; but even this of late has been questioned.

The statute further declares it treason to violate the King's companion, his eldest daughter unmarried, or the wife of the King's eldest son and heir: that is, to have carnal knowledge of the King's wife, eldest daughter, and his eldest son's wife, though with their own consents: it being high treason in both parties. The intention of this law is plainly to guard the blood royal, as I have before observed, from any suspicion of bastardy; for it is not treason to violate a queen or princess dowager.

It is also treason to levy war against the King in his realms. Under which words is held taking up arms under a pretence to reform religion or the laws, or to remove evil counsellors, or other grievances, whether real or pretended. Defending a castle against the King's forces, is also a levying of war. So also is an instruction to  
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pull down *all* inclosures, *all* chapels, *all* brothels, or the like; but a tumult to pull down a particular building is held only to be a riot, it is the universality of the design that makes it rebellion. A bare conspiracy to levy war does not amount to treason, unless it be attended with compassing or imagining the King's death.

A man is also guilty of high treason if he be adherent to the King's enemies in his realm, giving to them aid and comfort; such as by giving enemies at open war intelligence, sending them provisions, selling them arms or ammunition, treacherously surrendering a fortress, or the like; but these must be proved by some overt act. Giving assistance to foreign pirates or robbers invading our coast, without any commission from any foreign power, is also clearly treason: and so also is the same aid or assistance given to our fellow subjects in rebellion at home, which would be treason if given to our open enemies abroad, it coming under the description of levying war against the King. But to relieve a rebel fled out of the kingdom is not treason, for criminal statutes are always construed strictly: neither is it treason to join either rebels or enemies within the kingdom, if we do it through compulsion or fear, provided we quit them whenever a safe opportunity occurs.

Counterfeiting the King's great or privy seal is also high treason. But if a man takes the great seal from one patent and fixes it to another, it is only a great abuse of the seal, and a misprision.

It is also high treason to counterfeit the King's money, or to bring false money into the realm counterfeit to the money of England, knowing the money to be false, to merchandize and make payment withal. Also if the King's own minters alter the standard or alloy established by law, it is treason. But our own gold and silver coin are only held to be within this statute; and uttering it, without importing it, is not within the statute. By the 1 Mar. st. 2. c. 6. however, it is made high treason to falsely forge or counterfeit any such kind of coin of gold or silver as is not the proper coin of this realm, but shall be current within this realm, by consent of the crown; or to falsely forge or counterfeit the sign manual, privy signet, or privy seal: and, by 1 & 2 Ph. & M. c. 11. to bring into this realm such false or counterfeit foreign money, being current here, knowing the same to be false, with intent to utter the same in payment: but this money must be such as is made current here by proclamation. Portugal money.



money was never current by proclamation, of course counterfeiting Portugal money does not amount to high treason, but is a crime of an inferior degree. By 5 Eliz. c. 11. clipping, washing, rounding, or filing, for wicked gain's sake, any of the money of this realm, or other money suffered to be current here, is high treason. And by 18 Eliz. c. 1. impairing, diminishing, falsifying, scaling, and lightening it: also by 8 & 9 W. III. c. 26. made perpetual by 7 Ann. c. 25. whoever, without proper authority, shall knowingly make or mend, or assist in so doing, or shall buy, sell, conceal, hide, or knowingly have in his possession any implements of coinage specified in the act, or other tools or instruments proper only for the coinage of money, or shall convey the same out of the King's mint; he, together with his counsellors, procurers, aiders, and abettors, shall be guilty of high treason. By the same statute it is also an equal crime to mark any coin on the edges with letters or otherwise, in imitation of those used in the mint; or to colour, gild, or case over any coin resembling the current coin, or even round blanks of base metal: but all prosecutions on this act are to be commenced within three months after the commission of the offence: except those for making or mending any instrument for coining; or marking money round the edges, which must be commenced within six months after the offence committed. And by 15 and 16 Geo. II. c. 28. if any person colours or alters any shilling or six-pence, either lawful or counterfeit, to make them respectively resemble a guinea or half-guinea, or any halfpenny or farthing, to make them respectively resemble a shilling or sixpence, he shall be adjudged guilty of high treason; but the offender shall be pardoned, if (out of prison) he discovers and convicts two other offenders of the same kind.

By 25 Edw. III. c. 2. also, it is high treason, if a man slay the chancellor, treasurer, or the King's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices. Mere wounding or attempting to kill is not included under these cases; nor do they extend to the barons of the Exchequer, as such, but by 5 Eliz. c. 18. and 1 W. and M. c. 21. the lord keeper or commissioners of the great seal seem to be within them.

By 5 Eliz. c. 1. to defend the pope's jurisdiction in this realm is, for the first offence, a heavy misdemeanor, and for the second high treason. By 27 Eliz. c. 2. if any popish priest, born in the dominions



minions of the crown of England, shall come hither from beyond the seas, unless driven by stress of weather, and departing in a reasonable time; or shall tarry here three days without conforming to the church, he is guilty of high treason. And by 3 Jac. I. c. 4. If any natural-born subject be withdrawn from his allegiance and reconciled to the pope or see of Rome, or any other prince or state, both he and all such as procure such reconciliation shall incur the guilt of high treason. Every popish priest of course renounces his allegiance to his temporal prince, the moment he takes orders, and is held to be reconciled to the pope: an obstinate defence also of the pope's authority here, or a formal reconciliation to the see of Rome, this statute construes to be a withdrawing from one's natural allegiance.

By 17 Geo. II. c. 39. if any of the sons of the pretender shall land or attempt to land in this kingdom, or be found in Great Britain or Ireland, or any of the dominions belonging to the same, he shall be deemed guilty of high treason: and to correspond with them, or to remit money for their use, is an equal crime. By 1 Ann. 2. st. 2. c. 17. If any person shall endeavour to deprive or hinder any person, being the next in succession to the crown, according to the limitation of the act of settlement, from succeeding to the crown, and shall maliciously and directly attempt the same by any overt act, such offence shall be high treason. And by 6 Ann. c. 7. If any person shall maliciously, advisedly, and directly, by writing or printing, maintain and affirm that any other person hath any right or title to the crown of this realm, otherwise than according to the act of settlement; or that the King of this realm, with the authority of parliament, are not able to make laws and statutes to bind the crown, and the descent thereof, such person shall be guilty of high treason.

So much for the crime: the punishment is dreadful. The offender is to be drawn, that is, dragged to the gallows. (A sledge indeed is now allowed from humanity to preserve the unhappy criminal from the torment of being dragged upon the pavement); he is to be hanged by the neck, and then cut down alive; his entrails are to be taken out and burned while he is yet alive; his head to be cut off; his body to be divided into four parts, and his head and quarters to be at the King's disposal.

The King may and frequently has discharged, where any nobleman is attainted, all the punishment, except that of beheading. In  
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the case of coining, the punishment in men is milder, being that only of being drawn and hanged till dead: but as decency forbids exposing and mangling the bodies of women; their punishment is to be drawn to the gallows, and there burned alive.

Attainder, forfeiture, and corruption of blood, are the consequences of this judgment: but this we shall speak of hereafter.

2. The next offences to be treated of under those against the King and government, are felonies injurious to the royal prerogative.

Felony in its derivative sense, from *fee* and *lon*, two northern words, signifying estate and price, implies forfeiture, or an act done at the price of one's estate, to which some capital or other punishment is annexed according to the degree of guilt: but I shall consider it as implying a capital offence.

Of such felonies as are injurious to the King's prerogative, there are six; *viz.* Offences relating to the coin not amounting to treason; Felonies against the King's counsel; Serving foreign powers; Embezzling or destroying the King's armour or warlike stores; and, A desertion from the army in time of war.

With respect to the coin, there are some misdemeanors not amounting even to felony. By 27 Edw. I. c. 3. none shall bring any foreign coins of base metal, into the realm, on pain of forfeiture of life and goods. By 9 Edw. III. st. 2. no sterling money shall be melted down on pain of forfeiture thereof. By 17 Edw. III. none shall bring false or ill money into the realm, on pain of forfeiture of life and member by the persons importing, and the searchers permitting such importation. By 3 Hen. V. st. 1. to make, coin, buy, and bring into the realm any gally half-pence, fuskens, or dotkins, in order to utter them, is felony; and knowingly to receive or pay either them or blanks, by 2 Hen. VI. c. 9. is forfeiture of a hundred shillings. By 14 Eliz. c. 3. forgers of foreign coin, though not made current here by proclamation, shall (with their aiders and abettors) be guilty of misprision of treason, a crime that will be explained by-and-by. By 13 and 14 Car. II. c. 31. melting down any current silver money, shall be punished with forfeiture of the same, and also double the value, and the offender, if a freeman of any town shall be disfranchised: if not, shall suffer six months imprisonment. By 6 and 7 W. III. c. 17. if any person buys or sells, or knowingly has in his custody any chippings or filings of the coin, he shall forfeit  
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the same, and five hundred pounds, one moiety to the King, and the other to the informer; and be branded in the cheek with the letter R. By 8 and 9 W. III. c. 26. if any person shall blanch or whiten copper for sale (making it resemble silver) or buy, or sell, or offer to sale any malleable composition, which shall be heavier than silver, and look, touch, and wear like gold, but be beneath the standard; or if any person shall receive or pay any counterfeit or diminished milled money of this kingdom, not being cut in pieces (an operation which all persons are empowered by statute to do, when tendered to them) at a less rate than it shall import to be of; all such persons shall be guilty of felony, and may be prosecuted for the same at any time within three months after the offence committed. By 15 and 16 Geo. II. c. 28. if any person shall utter or tender in payment any counterfeit coin, knowing it so to be, he shall, for the first offence, be imprisoned six months, and find sureties for his good behaviour for six months more; for the second offence, shall be imprisoned two years, and find sureties for two years more; and for the third offence, shall be guilty of felony, without benefit of clergy. (It behoves every one to attend to this law, as many are guilty of putting off a bad piece of money, saying it shall go as they received it.) Also if a person knowingly tenders in payment any counterfeit money, and at the same time has more in his custody, or shall, within ten days after, knowingly tender other false money, he shall be deemed a common utterer of counterfeit money, and shall, for the first offence, be imprisoned one year, and find sureties for his good behaviour for two years longer; and for the second, be guilty of felony without benefit of clergy. By 11 Geo. III. c. 40. persons counterfeiting copper halfpence or farthings, with their abettors, or buying, selling, receiving, or putting off any counterfeit copper money (not being cut in pieces or melted down) at a less value than it imports, shall be guilty of single felony. And by a temporary statute (14 Geo. III. c. 42.) if any quantity of money, exceeding the sum of five pounds, being or purporting to be the silver coin of this realm, but below the standard of the mint in weight and fineness, shall be imported into Great Britain or Ireland, the same shall be forfeited in equal moieties to the crown and prosecutor.

Felonies against the King's council are where any sworn servant of the King's household conspires or confederates to kill any lord of this



realm, or other person sworn of the King's council. 3 Hen. VII. c. 14. and assaulting the King, wounding, or attempting to kill any privy counsellor in the execution of his office, is by 9 Ann, c. 16. felony without benefit of clergy.

By 3 Jac. I. c. 4. it is felony for any person whatever to go out of the realm to serve any foreign prince, without having first taken the oath of allegiance before his departure. It is felony also for any gentleman or person of higher degree, or who hath borne any office in the army, to go out of the realm to serve such foreign prince or state, without previously entering into a bond with two sureties, not to be reconciled to the see of Rome, or enter into any conspiracy against his natural sovereign. By 9 G. II. c. 30. enforced by 29 Geo. II. c. 17. if any subject of Great Britain shall enlist himself, or if any person shall procure him to be enlisted in any foreign service, or detain or embark him for that purpose, without licence under the King's sign manual, he shall be guilty of felony without benefit of clergy; but if the person so enlisted or enticed, shall discover his seducer within fifteen days, so as he may be apprehended and convicted of the same, he shall be indemnified. And by 29 Geo. II. c. 17. to serve under the French king as a military officer, and to enter into the Scotch Brigade in the Dutch service, without previously taking the oaths of allegiance and abjuration, shall be a forfeiture of five hundred pounds.

Embezzling or destroying the King's armour or military stores, is also felony by 31 Eliz. c. 4. which enacts, That if any person having the charge or custody of the King's armour, ordnance, ammunition, or habiliments of war, or of any victual provided for victualing the King's soldiers or mariners; shall either for gain, or to impede his majesty's service, embezzle the same to the value of twenty shillings, such offence shall be felony, and by 22 Car. II. c. 5. without benefit of clergy; and equally so for naval stores. There are several other statutes that punish inferior misdemeanors and embezzlements of this kind with fine, corporal punishment, and imprisonment.

Desertion in time of war from either land or sea service, either in England or abroad (independent of the annual mutiny and desertion acts) is by 18 Hen. VI. c. 19. and 5 Eliz. c. 5. felony without benefit



benefit of clergy, and by 2 and 3 Edw. VI. c. 2. the offence is made triable by the justices of every county.

3. Another species of offence against the King and his government, is *præmunire*, so called from *præmunire facias* A. B. the words of the writ preparatory to the prosecution. The statutes against this offence were framed to put a stop to the overgrowing evil of papal usurpations in this kingdom, which tended to diminish the power of the crown. For this purpose, to put an end to the pope's appointing to bishopricks, it is enacted by 25 Hen. VIII. c. 20. That if the dean and chapter refuse to elect the person named by the King, or if any archbishop or bishop refuse to confirm or consecrate him, they shall incur the penalties of the statutes of *præmunire* (a barbarous word for *præmoneri*;) which were antient statutes formed in the reign of Ric. II. What these penalties are will be shewn below. By 5 Eliz. c. 1. to refuse the oath of supremacy will incur the same penalties: and to defend the pope's jurisdiction in this realm is a *præmunire* for the first offence, and high treason for the second. By 13 Eliz. c. 2. to import any *agnus Dei*, crosses, beads, or other superstitious things pretended to be hallowed by the bishop of Rome, and tender the same to be used; or to receive the same with such intent, and not discover the offender; or, if a justice of the peace, knowing thereof, shall not within fourteen days declare it to a privy counsellor, they all incur a *præmunire*: but importing or selling mass books, or other popish books, is, by 3 Jac. I. c. 3. sect. 25. only a penalty of forty shillings. To contribute to the support of a jesuits college, or any popish seminary beyond sea, or to the maintenance of any jesuit or popish priest in England, is by 27 Eliz. c. 2. liable also to the pains of *præmunire*.

By later statutes the same penalties are inflicted for offences that bear little or no allusion to the design for which the statutes of *præmunire* were first established. By 13 Eliz. c. 10. acting as a broker or agent in any usurious contract, where above ten *per cent.* interest is taken, incurs the penalties of *præmunire*. So does it by 21 Jac. I. c. 3. to obtain any stay of proceedings, other than by arrest of judgment or writ of error, in any suit for a monopoly; also by 16 Car. I. c. 21. & 1 Jac. II. c. 8. to obtain an exclusive patent for the sole making or importation of gunpowder or arms, or to hinder others from importing them; also, by 13 Car. II. c. 1. to assert maliciously and advisedly, by speaking or writing, that both or either House of



Parliament have a legislative authority without the King. By 31 Car. II. c. 2. to send any subject of this realm a prisoner into parts beyond the seas is a *præmunire*, incapable of pardon. By 1 W. & M. ft. 1. c. 8. persons of eighteen years of age refusing to take the new oaths of allegiance as well as supremacy, on tender by the proper magistrate, are liable to the pains of *præmunire*; and by 7 & 8 W. III. c. 24. serjeants, counsellors, proctors, attorneys, and all officers of courts, practising without having taken the oaths of allegiance and supremacy, and subscribed the declaration against popery, are guilty of a *præmunire*, whether the oaths be tendered or no. By 6 Ann. c. 7. it is a *præmunire* to assert maliciously, and directly, by preaching, teaching, or advisedly speaking, that the then pretended prince of Wales, or any person, other than according to the acts of settlement and union, hath any right to the throne of these kingdoms, or that the King and parliament cannot make laws to limit the descent of the crown. By 6 Ann. c. 23. if the assembly of peers of Scotland, convened to elect their sixteen representatives, shall presume to treat of any other matter, save only the election, they incur the penalties of a *præmunire*: so do, by 12 Geo. III. c. 11. all such as knowingly and willfully solemnize, assist, or are present at, any forbidden marriage of such of the descendants of the body of King George II. as are by that act prohibited to contract matrimony without the consent of the crown.

The punishments of *præmunire* are as follow: “That, from the  
“ conviction, the offender shall be out of the King’s protection, and his  
“ lands and tenements, goods and chattels forfeited to the King, and  
“ that his body shall remain in prison at the King’s pleasure, or (ac-  
“ cording to some) during life.” It was antiently held that a man convicted of *præmunire*, might at any time be put to death with impunity: but to prevent this it is enacted by 5 Eliz. c. 1. That it shall not be lawful to kill any person attainted in a *præmunire*, any law, statute, opinion, or exposition of law to the contrary notwithstanding; such offender, however, can bring no action for any private injury, let it be ever so atrocious: and no man, knowing him to be guilty, can with safety give him aid or relief.

4. A fourth species of offences against the King and his government are called Misprisions (from *mespris*, contempt) and contempts.

By



By misprisions are understood all high offences bordering upon capital offences, but not absolutely so: and it is said, that as in every treason and felony, a misprison is contained, the King may proceed against the offender for the misprison only.

Misprisions are of two kinds, negative and positive. Negative misprisions are the concealing what the law enjoins to be revealed; positive, the committing what the law absolutely prohibits.

Misprison of treason is of the negative kind, and by 1 & 2 P. & M. c. 10. consists in the mere knowing and concealing of treason, though no assent be given thereto; for assent makes the assentor a principal. Every man apprized of treason is, by the Common Law, bound to reveal it, as soon as convenient, to some judge of assize or justice of the peace. This will acquit him of misprison. But if there be any probable circumstances of assent; that is to say, if a man goes to a treasonable meeting, knowingly, and being at such a meeting once by accident, and hearing a treasonable conspiracy, meets a second time, and hears more, and conceals it; the law deems this an assent, and the concealer is guilty of high treason.

By 13 Eliz. c. 2. forgers of foreign coin, not current in this kingdom, their, aiders, abettors, and procurers are all guilty of misprison of treason; the punishment of which is, loss of the profits of lands during life, forfeiture of goods, and imprisonment for life.

Misprison of felony is, as in treason, the concealing a known felony, to which a man might never assent: the punishment for which is, in a public officer, by Westm. 1. 3 Edw. I. c. 9, imprisonment for a year and a day; in a common person, imprisonment for a less time, at the discretion of the judge; and in both, fine and ransom at the King's pleasure: by which King's pleasure, here, and in all cases, is understood at the pleasure of the judges in the King's courts of justice.

Concealing of treasure-trove, which belongs to the King or his grantees is also a negative misprison, and punishable with fine and imprisonment.

Positive misprisions are called contempts or high misdemeanors: of these the mal-administration of state officers is one, and usually punished by banishment, imprisonment, fines, or perpetual incapacity to serve again, and this through the mode of parliamentary impeachment. The offence of embezzling the public money is also of this kind, and subjects the offender to a discretionary fine and imprisonment.

Refusing



Refusing to assist the King by advice in council, if called upon, or by personal service in war against a rebellion or invasion; omitting to join the *posse comitatus* at the request of the sheriff or justices, agreeable to 2 Hen. V. c. 8. which all persons fifteen years of age, under the degree of nobility, and able to travel, are bound to do; are contempts against the King's prerogative; so is taking a pension from any foreign prince without the King's consent; disobeying the King's lawful commands, whether issued by writs from the courts of justice, by summons to attend his privy council, or by letters commanding the return of any one from abroad (in disobedience to which his lands shall be seised till he does return, and himself punished afterwards) or by his proclamation or writ of *ne exeat regnum*, commanding him to stay at home: so also is disobedience to any act of parliament where no penalty is inflicted: and in all these cases the contempt is punishable by fine and imprisonment, at the discretion of the judge.

Writing or speaking against the King, cursing, or wishing him ill, defaming him, or doing any thing that may either lessen him in the opinion of his subjects or weaken his government, is a contempt and misprision against the King's person and government. To drink to the pious memory of a traitor; or for a clergyman to absolve traitors at the gallows who persist in the treasons for which they suffer, have been held as offences of this species; for which the offender may not only be fined and imprisoned, but suffer the pillory or other infamous corporal punishment.

Denying the King's right to the crown, by advisedly speaking, is a *præmunire*; but in common and unadvised discourse, it is only a contempt against the King's title, and punishable by fine and imprisonment. Also by 13 Eliz. c. 1. if any person shall in any-wise hold, affirm, or maintain, that the common laws of this realm, not altered by parliament, ought not to direct the right of the crown of England, it is a misdemeanour and punishable with forfeiture of goods and chattels. Refusing or neglecting to receive the sacrament, and take the oaths appointed by statute for the better securing the government, and yet acting in a public office, place of trust, or other capacity, for which the said oaths are required to be taken, within six calendar months after admission, is also a contempt; the penalties for which are by 1 Geo. I. st. 2. c. 13. incapacity to hold the said office or any other; to prosecute any suit; to be guardian or executor; to  
take



take any legacy or deed of gift; and to vote at any election for members of parliament: and after conviction the offender shall also forfeit five hundred pounds to him or them that will sue for the same. But any person forfeiting his office, may take a new grant thereof, on his taking the oaths, and conforming, provided it be not filled up before: and, by some act in almost every session of parliament, persons who have omitted to qualify themselves in due time, are indemnified, provided they qualify within a time in such act limited, and provided judgment hath not been given against them for the penalty incurred by their neglect, and provided their place is not filled up. *Burn. Office.* Persons, however, beyond the seas, shall not be disabled, if they qualify within six months after their return. 9 Geo. II. c. 26. s. 4. Members on the foundation of any college in the two universities, who by this statute are bound to take the oaths, must also register a certificate thereof in the college-register, within one month after; otherwise, if the electors do not remove him, and elect another within twelve months, or after, the King may nominate a person to succeed him by his great seal or sign manual. Besides thus taking the oaths for offices, any two justices of the peace, may, by the same statute, summon and tender the oaths to any person whom they shall suspect to be disaffected; and every person refusing the same, becomes a non-juror, and shall be adjudged a popish recusant convict, and subject to the same penalties with such recusant, which, in the end, may amount to the alternative of abjuring the realm or suffering death as a felon.

By 33 Hen. VIII. c. 12. malicious striking in the King's palace, wherein his royal person resides, whereby blood is drawn, is a contempt against the palace, and punishable by perpetual imprisonment and fine at the King's pleasure, and also with loss of the offender's right hand.

Striking in the King's upper courts of justice in Westminster Hall, or at the assizes, is a contempt against such courts, and whether blood be drawn or not, is punishable with the loss of the right hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of lands during life; even assaulting a judge sitting in the court, by drawing a weapon, is punishable in the same way. The rescue also of a prisoner from any of the said courts, without striking a blow, is punished with perpetual imprisonment, and forfeiture of goods and of the



the profits of lands during life. And an affray or riot, near the said courts, but out of their actual view, is punishable with fine and imprisonment. Nay even threatening or reproachful words only to any judge, sitting in the courts, is a high misprision, and punishable with large fines, imprisonment, and corporal punishment. In the inferior or lower courts, an affray, or contemptuous behaviour, is punishable with a fine by the judges there sitting; even by the steward in a court-leet, or the like. Such as are guilty of injurious treatment to any under the immediate protection of a court of justice, are also punishable with fine and imprisonment, as if a man assaults or threatens his adversary for suing him; a counsellor or attorney for being employed against him; a juryman for his verdict; or a gaoler, &c. for keeping him in custody, and doing his duty; nay even to dissuade a witness from giving evidence; disclosing an examination before the privy-council; or advising a prisoner not to plead: all which are impediments of justice, and of course contempts of the King's courts, and punishable with fine and imprisonment. The same punishment attends any of the grand jury, who shall disclose to the person indicted the evidence that appeared against him.

IV. The next offences we proposed to consider in our order of distribution, are such as infringe the rights of the public. This species includes such a number of inferior and subordinate classes, as were we to enter critically into the whole, would be tedious to the last degree; we will confine ourselves therefore to general descriptions. These then may be divided into five, *viz.* 1. Offences against public justice; 2. Those against public peace; 3. Those against trade; 4. Those against public health; and, 5. Those against the police.

1. Of those offences against public justice, are the following, embezzling or vacating records; abuses of gaolers; obstructing process, escapes from confinement; breaking prison; rescue; returning from transportation; taking rewards for stolen goods; receiving such goods; compounding felony; barrettry; maintenance; champerty; compounding informations; conspiracy; perjury; bribery; embracery; false-verdicts; negligence of duty; oppression; and extortion.

*Embezzling or vacating records*, or falsifying certain other proceedings in a court of judicature. By 8 Hen. VI. c. 12. if any clerk or other person shall wilfully take away, withdraw, or avoid any record or process in the superior courts of justice in Westminster Hall, by reason



reason whereof the judgment shall be reversed, or not take effect, it is felony not only in the principal actors, but also in their procurers and abettors. By 21 Jac. I. c. 26. to acknowledge any fine, recovery, deed enrolled, statute, recognizance, bail, or judgment, in the name of another person not privy to the same, is felony without benefit of clergy. This law extends only to the courts themselves; but, by 4 W. and M. c. 4. to personate any other person (as bail) before any judge of assize, or other commissioner authorized to take bail in the country, is also felony.

To prevent *abuses in gaolers*, by 14 Edw. III. c. 10. if any gaoler by too great dures of imprisonment makes any prisoner, that he hath in ward, accuse and turn evidence against some other person, he is guilty of felony.

In *obstructing* the execution of arrests in criminal *process*, it hath been held that the party opposing such arrest, becomes a partaker of the crime, that is, an accessory in felony and a principal in high treason. And by several statutes persons opposing the execution of any process in pretended privileged places within the bills of mortality in London; such as White Friars, the Savoy, and the Mint; or abusing any officer in his endeavours to execute his duty therein, so that he receives bodily hurt, shall be guilty of felony, and transported for seven years; and persons in disguise, joining in or abetting any riot or tumult on such account, or opposing any process, or assaulting and abusing any officer executing or for having executed the same, shall be felons without benefit of clergy.

A criminal's *escaping* when arrested, is punishable by fine and imprisonment; so is the officer should he suffer such escape, either by negligence or connivance; the criminal is punishable by fine, and the officer is liable to be punished in the same degree as the criminal would, if convicted, whether it be for treason, felony, or trespass, and this whether the prisoner was actually committed to gaol, or only under an arrest. But though the felony for which the prisoner was committed be not within clergy, the officer shall have the benefit of clergy. 1 H. H. 599. The officer however cannot thus be punished, unless the criminal so escaping had received judgment, or been attainted upon verdict, confession, or outlawry of the crime for which he was in custody. Though before the conviction of the prisoner, the officer for such neglect may be punished by fine and imprisonment.



*Breaking out of prison*, when committed for a capital offence, is felony in the offender at Common Law; and if in confinement, either in gaol or the stocks, for any lesser charge, it is punishable with fine and imprisonment.

*Rescuing* a prisoner from an arrest or imprisonment, makes a man equal in guilt with the person so arrested or imprisoned, and he is liable to be arraigned and punished for the same, in an equal degree, if the person rescued had received judgment or been attainted. By 11 Geo. II. c. 26. and 24 Geo. II. c. 40. if five or more persons assemble to rescue any retailers of spirituous liquors, or to assault the informers against them, they are guilty of felony, and shall be transported for seven years. By 16 Geo. II. c. 31. conveying to any prisoner in custody for treason or felony, any arms, instruments of escape, or disguise, without the knowledge of the gaoler, though no escape be attempted, or any way to assist such prisoner to attempt an escape, though no escape be actually made, is felony and punishable with transportation for seven years: or, if the prisoner be in custody for petit larceny or other inferior offence, or charged with a debt of one hundred pounds, it is a misdemeanour and punishable with fine and imprisonment. And by the several acts for transportation, destroying turnpikes, &c. smuggling, murder, and the black acts, to rescue or attempt to rescue any person committed for the offences in those acts is felony without benefit of clergy: and to rescue or attempt to rescue the body of a felon executed for murder, is single felony and punishable with transportation for seven years. Nay, if any person be charged with any of the offences in the black act, 9 Geo. I. c. 22. and being required by order of the privy council to surrender, neglects so to do for forty days, both the offender and all that knowingly conceal, aid, abet, or succour him, are deemed guilty of felony without benefit of clergy.

*Returning from transportation* before the expiration of the term for which the offender was ordered to be transported, or had agreed to transport himself, is, by several statutes, made felony also without benefit of clergy; as is also the assisting such a person to escape from the persons conveying them to the port of transportation.

*Taking rewards* under a pretence of helping the owner to his goods stolen, is, by 4 Geo. I. c. 11. equally criminal with the stealing; and the offender shall suffer as the felon who stole them, unless he causes  
such



such principal felon to be apprehended and tried, and gives evidence against him.

*Receivers of stolen goods*, knowing them to be stolen, are by 3 and 4 W. and M. c. 9. and 5 Ann, c. 31. deemed accessory to the theft and felony, and are punishable accordingly *with* the principal or *after* the principal is convicted: and by 1 Ann, c. 9. and 5 Ann, c. 31. such receivers may be prosecuted for a misdemeanour, and punished by fine and imprisonment, though the principal felon be not *before* taken so as to be prosecuted and convicted. In the case of stolen lead, iron, and certain other metals, such offence is by 29 Geo. II. c. 30. punishable by transportation for fourteen years; persons also having lead, iron, and other metals in their custody, and not giving a satisfactory account how they came by the same, are guilty of a misdemeanour, and punishable by fine and imprisonment. And by 10 Geo. III. c. 48. all knowing receivers of stolen plate or jewels, taken by robbery on the highway, or when a burglary accompanies the stealing, may be tried as well *before* as *after* the conviction of the principal, and whether he be in or out of custody; and if convicted, shall be adjudged guilty of felony, and be transported for fourteen years.

Theft-bote, or *compounding of felony*, that is, where the person robbed, not only knows the robber, but also takes his property again, or receives other amends on agreement not to prosecute, is punishable as a misdemeanour with fine and imprisonment. Nay, by 25 Geo. II. c. 36. advertising a reward for the return of things stolen, with "No questions asked," or words to that effect, subjects the deliverer and printer, each to a penalty of fifty pounds.

Frequently exciting and occasioning suits and quarrels, either at law or otherwise, called common *barretry*, is an offence punishable with fine and imprisonment. But no one can be a barrator in respect of one act only. An indictment must charge the defendant with being a *common* barrator. 1 *Haw.* 243—4. By 12 Geo. I. c. 29. if any one, who hath been convicted of forgery, perjury, subornation, or common *barretry*, shall practice as an attorney, solicitor, or agent in any suit; the court, upon complaint, shall examine it in a summary way; and if proved, shall direct the offender to be transported for seven years. Suing another in the name of a fictitious plaintiff, if in any of the King's superior courts, is a high contempt and punishable at their discretion; in the lower courts, by 8 Eliz. c. 2. it is



punishable by six months imprisonment, and treble damages to the party injured.

Officious intermeddling in a suit, that we have no concern in, by maintaining or assisting either party with money to carry it on, called *maintenance*, is an offence also against public justice, and punishable at Common Law by fine and imprisonment; and by 32 Hen. VIII. c. 9. with a forfeiture of ten pounds. But a man may support the suit of his near relation, his servant, or his poor neighbour, from charity and compassion, with impunity.

There is another species of maintenance; as where one assists another in his pretensions to certain lands, by taking or holding the possession of them for him by force or subtlety; or where one stirs up quarrels, and suits in the country, in relation to matters wherein he is no way concerned: and this kind of maintenance is punishable at the King's suit by fine and imprisonment, whether the matter in dispute any way depended in plea or not; but it is said not to be actionable. 1 Haw. 249.

*Champerty* is a species of maintenance, and punishable in the same manner; being the agreement of any one with a plaintiff or defendant, to pay the expences of a suit, on condition of dividing the property sued for between them in case they prevail; which is a kind of purchasing a suit or right of suing. To prevent this no man at Common Law can assign any right in a thing, unless he has that thing absolutely in possession; and by 32 Hen. VIII. c. 9. no one shall sell or purchase any pretended right or title to any land, unless the vender hath received the profits thereof for one whole year before such grantor hath been in actual possession of the land, or of the reversion or remainder; on pain that both purchaser and vendor shall forfeit the value of such land to the King and prosecutor. These offences relate to civil suits only. But,

*Compounding of informations* upon penal statutes is a similar offence in criminal causes; to prevent which, the 18 Eliz. c. 5. §. 4. enacts, That if any person informing under pretence of any penal law, makes any composition without leave of the court, or takes any money or promise from the defendant to excuse him, he shall forfeit ten pounds, shall stand two hours on the pillory, and shall be for ever disabled to sue in any popular or penal statute.



A *conspiracy* to indict an innocent person of felony is a farther abuse of justice. If such innocent person be thus maliciously indicted and acquitted, he may either have a civil action against the conspirators, (as I have shewn p. 215.) or he may indict them at the suit of the King, and punish them by imprisonment, fine, and pillory. Sending letters threatening to accuse any one of a crime punishable with death, transportation, pillory, or other infamous punishment, in order to extort money, or other valuable chattels, is by 30 Geo. II. c. 24. punishable at the discretion of the court, with fine, imprisonment, pillory, whipping, or transportation for seven years.

Wilful and corrupt *perjury* is another offence under this head; but the law takes notice of no perjury, but such as is committed in some court of justice, or before some magistrate or officer properly authorized to administer an oath, in some civil or criminal proceedings. The perjury must almost be corrupt, wilful, and positive, not committed on surprize or the like; it must also be in some point material to the matter in question; no regard being paid either to voluntary oaths or perjury in any trifling collateral circumstance. A Jew is sworn on the Old Testament, and perjury upon the statute may be assigned upon this oath. 2 *Keb.* 314. And Jews are allowed to wear their hats when they take an oath. *Str.* 821. Mahomedans may be sworn upon the Koran. *Str.* 1104. And Heathens after the manner of their own country. 1 *Atk.* 21. Subornation of perjury is procuring another to take such a false oath as would be considered as perjury in the taker. The punishment for perjury, or subornation of perjury, at Common Law is fine and imprisonment. But the 5 Eliz. c. 9. if the offender be prosecuted on that statute, inflicts perpetual infamy, and a penalty of forty pounds on the suborner; and, in default of payment, imprisonment for six months, and to stand with both ears nailed to the pillory. Perjury, by the same statute, is punishable with six months imprisonment, perpetual infamy, and a fine of twenty pounds, or to have both ears nailed to the pillory. But, as 2 Geo. II. c. 25. gives the court a power also, either to send the offender to the house of correction for a term not exceeding seven years, or transport him for the same period, and makes it felony, without benefit of clergy, to escape or return before the expiration of the time; on this account, prosecutions for this offence are usually carried on at Common Law. Indeed if a defendant perjureth himself in Chancery, the  
Exchequer



Exchequer Chamber, or the like, he is not punishable by 5 Eliz. that extending only to the witnesses: 3 *Inst.* 166. but he is punishable for the same by indictment at the Common Law. *Bur. Mansfield.* 1189. Neither is perjury, or subornation of perjury, in an action depending by *indictment* within the statute of the 5th Eliz. but only in an action depending by *writ, action, bill, complaint, or information.* 3 *Inst.* 164. And it seems clear, that if the person incited to take such a false oath, do not actually take it, the person by whom he was so incited, is not guilty of subornation of perjury; yet it is certain, that he is liable to be punished, not only by fine, but also by infamous corporal punishment. 1 *Haw.* 177. But to convict a man of perjury, a probable evidence is not enough, but it must be a strong clear evidence, and the witnesses must be more numerous than those on the side of the defendant, for otherwise, it is only oath against oath. 10 *Mod.* 194. And the party prejudiced by the perjury shall not be admitted to prove the perjury. *L. Raym.* 396. Quakers making solemn affirmation wilfully and corruptly, shall suffer as in cases of perjury. 8 Geo. I. c. 6. s. 2.

*Bribery* is another species of offence against public justice; that is, when a judge or other person concerned in the administration of justice takes an undue reward to influence his conduct in his office. In inferior officers this offence is punished with fine and imprisonment, and in the offer of a bribe, whether taken or not, the same. But by 11 Hen. IV. all judges and officers of the King, convicted of bribery shall forfeit treble the bribe, be punished at the King's will, and be discharged from the King's service for ever. The Chief Justice Thorp was hanged for it in the reign of Edw. III. and some remarkable examples have been made in parliament of persons in the highest stations guilty of this crime.

Attempting to influence a jury corruptly to any one side, by any means whatever, is called *Embracery*, and is punishable by fine and imprisonment; and in the jurors so influenced, by divers statutes of Edw. III. perpetual infamy, imprisonment for a year, and forfeiture of the tenfold value.

*False verdicts* of jurors, whether occasioned by embracery or not, was formerly punished by attain in the manner shewn, p. 250. s. 1.

*Negligence of duty* in sheriffs, coroners, constables, and other public officers entrusted with the administration of justice, is punishable by  
fine,



fine, and in very notorious cases, with the loss of their office, provided it be a lucrative one. By 29 Geo. II. c. 30. omitting to apprehend persons offering stolen lead, iron, and other metals to sale, is punishable by imprisonment and a fine stated in the act.

All *oppressions* and tyrannical partiality of judges and other magistrates, in the administration or under colour of their office, if prosecuted either by impeachment in parliament, or by information in the court of King's Bench, according to the rank of the offenders, is ever severely punished by fines, imprisonment, forfeiture of office, or other discretionary censure.

*Extortion* is the last offence I shall mention under the abuses of public justice. This is an officer's unlawfully demanding, in virtue of his office, any money or valuable consideration, that he has no right to demand, or before it be due; and is punishable by fine and imprisonment, and sometimes with a forfeiture of the office.

2. The next class of offences among those that infringe the rights of the public, are such as are levelled at the public peace, and called breaches of the peace. These are riotous assembling, unlawful hunting, sending threatening letters, destroying flood-gates, affrays, unlawful assemblies, tumultuous petitioning, forcible entry or detainer, going armed, spreading false tales, or prophecies, challenging to fight, and libels.

The *riotous assembling* of twelve persons and more, and not dispersing upon proclamation, is of this kind. By 1 Geo. I. c. 5. if any twelve persons are unlawfully assembled, to the disturbance of the peace, and any one justice of the peace, sheriff, under-sheriff, or mayor of a town shall think proper to command them by proclamation to disperse, if they contemn his orders, and continue together for one hour afterwards, such contempt shall be felony without benefit of clergy. And, if the reading of the proclamation be by force opposed, or the reader be in any manner wilfully hindered from the reading of it, such opposers and hinderers are felons, without benefit of clergy; and all persons to whom such proclamation ought to have been made, and knowing of such hindrance, and not dispersing, are felons, without benefit of clergy. And all persons are indemnified who shall chance to kill any of the mob in endeavouring to disperse them. And if any person so riotously assembled, begin, even before proclamation, to



to pull down any church, chapel, meeting-house, dwelling-house, or out-houses, they shall be felons without benefit of clergy.

By 9 Geo. I. c. 22. to appear armed in any enclosed forest or place where deer are usually kept, or in any warren for hares or conies, or in any high road, open heath, common, or down, by day or night, with faces blacked, or otherwise *disguised*, or (being so disguised) to hunt, wound, kill, or steal any deer, to rob a warren, or to steal fish, or to procure, by gift or promise of reward, any person to join them in such unlawful act, is felony without benefit of clergy.

Also by the same act, amended by 27 Geo. II. c. 15. knowingly to *send* any *letter* without a name, or with a fictitious name, demanding money, venison, or any other valuable thing, or *threatening*, without any demand, to kill any of the King's subjects, or to fire their houses, outhouses, barns, or ricks, is also felony without benefit of clergy.

By 1 Geo. II. st. 2. c. 19. and 8 Geo. II. c. 20. to pull down or destroy any *lock*, *sluice*, or *flood-gate* erected by act of parliament on a navigable river, or to rescue any person in custody for the same, is felony without benefit of clergy, and the offence may be tried in any adjacent county. And by 4 Geo. III. c. 12. maliciously damaging or destroying any banks, sluices, or other works on such navigable river, opening the flood-gates, or otherwise obstructing the navigation, is felony, punishable with transportation for seven years. Also by 7 Geo. III. c. 40. maliciously pulling down or otherwise destroying any *turnpike* gate or fence, toll-house, or weighing engine thereunto belonging, erected by authority of parliament, or to rescue any person in custody for the same is felony, without benefit of clergy, and the offence may be tried in any adjacent county.

*Affrays*, as the public fighting of two or more persons, is punishable by fine and imprisonment, according to the circumstances of the case. Duelling, disturbing the officers of justice in the execution of their office, fighting in the King's courts, in churches or church-yards, are great aggravations of the offence. Any private person present is justifiable in parting the combatants, let the consequence be what it may. Constables, and other similar officers, are bound to keep the peace, and may break open doors to suppress an affray, or apprehend the persons fighting, and may either carry them before a magistrate, or imprison them by his own authority, till the heat is over, and may perhaps then make them find sureties for the peace: but he must not lay hands on those who contend only with hot words. 4 *Haw.* 137.

By



5 & 6 Edw. VI. c. 4. if any person shall, by words only, quarrel, chide, or brawl, in a church or church-yard, the ordinary shall suspend him, if a layman, from going to church, if a clerk in orders, from the ministration of his office during pleasure: and, if any person in such church-yard proceeds to smite or lay violent hands upon another, he shall be excommunicated; or if he strikes him with a weapon, or draws any weapon with intent to strike, he shall, besides excommunication (being convicted by a jury) have one of his ears cut off; or, having no ears, be branded with the letter F in his cheek. *Two* persons may constitute an affray: but,

*Three* persons or more will constitute a *riot, rout, or unlawful assembly*. An unlawful assembly is the meeting of three or more to do an unlawful act, though they part again without any attempt towards it, and is punishable at Common Law, if the numbers assembled are more than three and less than twelve, by fine and imprisonment. A meeting of twelve persons may make the offence, as we have just seen, capital, according to the circumstances. A rout is, where three or more assemble to do an unlawful act upon a common quarrel, such as breaking down fences upon a right of way or common claimed; and making some advances towards it. A riot, is where three or more actually do an unlawful act of violence, even with or without a common cause of quarrel; or to beat a man, kill game in another's liberty, &c. or even to do a lawful act in a riotous manner, such as removing a nuisance: the punishment for a riot or rout is fine and imprisonment at Common Law, to which, in very atrocious cases, the pillory is sometimes added. If a jury acquit all but two in a riot, those two cannot be guilty, there must be three to constitute guilt. 2 *Haw.* 441. By 13 Hen. IV. c. 7. any two justices, together with the sheriff or under-sheriff of the county, may come with the *posse comitatus*, if need be, and suppress any such riot, assembly, or rout, arrest the rioters, and record upon the spot the nature and circumstances of the whole transaction; which record alone shall be a sufficient conviction of the offenders. On this statute it is held, that all persons, noblemen, and others, except women, clergymen, persons decrepid, and minors under fifteen, are bound to attend the justices in suppressing a riot, on pain of fine and imprisonment: and that any battery, wounding, or killing the rioters, that may happen in so doing, is justifiable.



By 13 Car. II. ft. 1. c. 5. not more than twenty names shall be signed to any petition to the King, or either house of parliament, for any alteration of matters established by law in church or state; unless the contents thereof be previously approved, in the county, by three justices, or the majority of the grand jury at the assizes or quarter-sessions; and in London, by the lord mayor, aldermen, and common council; and no petition shall be delivered by a company of more than ten persons, on pain in either case of incurring a penalty not exceeding one hundred pounds, and three months imprisonment. So near is *tumultuous petitioning* a-kin to rioting.

Violently taking or holding possession of lands and tenements, with menaces, force and arms, without the authority of law, called *forcible entry or detainer*, is punishable by several statutes. By 5 Ric. II. ft. 1. c. 8. all forcible entries are punished with imprisonment and ransom at the King's will, and, by divers other statutes, upon any forcible entry, or forcible detainer after peaceable entry, into any lands, or benefices of the church, one or more justices of the peace taking sufficient power of the county, may go to the place, and there record the force upon his own view, as in case of riots; and upon such conviction may commit the offender to gaol till he makes fine and ransom to the King. And further, the justice or justices have power to summon a jury, to try the forcible entry or detainer complained of; and if the same be found by that jury, then, besides the fine on the offender, the justices shall make restitution, by the sheriff, of the possession, without inquiring into the merits of the title; and the same may done by indictment at the general sessions; but this act does not extend to such as endeavour to maintain possession by force, where they themselves, or their ancestors have been in the peaceable enjoyment of the lands and tenements for three years immediately preceding. Holding over by force, where the tenant's title was under a lease, now expired, is held to be forcible detainer. If a forcible entry or detainer shall be made by three persons or more, it is a riot, and punishable as such. *Dalt.* c. 44.

Under the head of forcible detainer, I may mention that of an inn-keeper detaining the goods or person of his guest for the reckoning, or the horse of a guest, till he is paid for his food, and this he may do without any agreement for that purpose; but such a horse may be detained only for his own meat, and not for the meat of the guest, or  
that



that of any other horse, nor can the innkeeper use such horse, such detention being in the nature of a distress: by the custom, however, of London and Exeter, but in no other place, horses left at an inn, and eating out their own price, the innkeeper may take him as his own, on the reasonable appraisement of four of his neighbours; but by the custom of the realm, he hath no power to sell the horse. *Bac. Abr. Inns. D. 1 Bulst. 207.* By 11 & 12 W. III. c. 15. s. 2. if any innkeeper, alehousekeeper, victualler, or futler in giving any account or reckoning in writing or otherwise, shall refuse or deny to give in the particular number of quarts, or pints, or shall sell in measures unmarked; it shall not be lawful for him, for default of payment of such reckoning, to detain any goods or other thing belonging to the person or persons from whom such reckoning shall be due, but shall be left to his action at law for the same.

*Riding or going armed* with dangerous or unusual weapons, is deemed also an infringement of the peace, and is punishable by 2 Edw. III. c. 3. by imprisonment during the King's pleasure, and a forfeiture of the arms. But it is held upon this statute, that no person is within the meaning, who arms himself to suppress riots, rebels, or enemies; nor is any wearing of customary arms for ornament, or defence, in such places, and on such occasions, as the fashion authorizes, within the words of the statute; nor any man's assembling his neighbours and friends in his own house, against those who threaten to do him any violence, his house being his castle. 1 *Haw. 136.*

*Spreading false* and injurious news and *tales* that create jealousies and enmity between the King and his nobles, or concerning any great man of the realm, is punishable at Common Law with fine and imprisonment. So is it by several statutes. *False and pretended prophecies* alarming the people are equally unlawful and punishable, by 5 Eliz. c. 15. with a fine of one hundred pounds, and one year's imprisonment, for the first offence, and a forfeiture of all goods and chattels and imprisonment during life for the second.

Even exciting others to a breach of the peace is an offence of the same kind. *Challenges to fight* either by word or letter, or to be the bearer of such challenge, are punishable with fine and imprisonment according to circumstances. By 9 Ann. c. 14. if a challenge arises on account of any money won at gaming, or if any assault or affray



happen on such account, the offender shall forfeit all his goods to the crown, and suffer two years imprisonment.

*Libels*, in their most extensive meaning, imply any writings, pictures, or emblems of an immoral or illegal tendency; but in the sense we are to consider them here, they are malicious defamations made public by either printing, writing, signs, or pictures, and are deemed a breach of the peace, as they tend to disturb the public repose. In the eye of the law the communication of a libel, though it be to one person only, is a publication of it; of course, sending an abusive private letter to a man is as much a libel, as if it were openly printed. It is immaterial also whether the subject matter of the libel be true or false, it being the provocation that is punishable, and not merely the falsity, though the falsity is an aggravation of the crime. In a civil action we saw (page 214.) that a libel must appear false as well as defamatory, or the party libelled could prove no injury, of course, can obtain no compensation; but in such libels as are construed a breach of the peace, if they tend to provoke wrath, they are criminal. The punishment of such a libel, if either the making, repeating, printing, or publishing be proved, is fine, and such corporal punishment as the court thinks proper to inflict.

3. Offences against public trade are next in order; these are owling, smuggling, bankruptcy, usury, cheating, forestalling, regrating, engrossing, monopolies, carrying on trades unlawfully, and transporting and seducing artists.

*Owling*, so called from being committed in the night, is the exportation of wool or sheep from this kingdom, to the injury of the woollen manufacture. By 8 Eliz. c. 3. transportation of live sheep, or embarking them on board any ship, is forfeiture of goods, and one year's imprisonment, for the first offence, with the loss of the left hand at the end of the year, which shall be cut off in some public market, and there nailed upon the openest place; for the second offence it is felony. By 12 Car. II. c. 32. & 7 & 8 W. III. c. 28. exportation of wool, sheep, or fullers earth is subject to pecuniary penalties, and the forfeiture of the interest of the ship and cargo by the owners, if privy; and confiscation of goods, and three years imprisonment to the master and all the seamen: and by 4 Geo. I. c. 11. farther enforced by acts of Geo. II. transportation for seven years, if the penalties be not paid.

*Smuggling,*



*Smuggling*, or the clandestine importation of goods without paying the duty, is punished by a variety of statutes inflicting pecuniary penalties and seizure of the goods so imported, and adding the guilt of felony with transportation for seven years upon practices more open, avowed, and atrocious. And by 19 Geo. II. c. 34. if three or more persons shall assemble, with fire-arms or other offensive weapons, to assist in the illegal exportation or importation of goods, or in rescuing the same after seizure, or in rescuing offenders in custody for such offences, or shall pass with such goods in disguise; or shall wound, shoot at, or assault any officers of the revenue, when in the execution of their duty, such persons shall be felons without benefit of clergy. There are several laws also in force, inflicting pecuniary penalties on the buyers or sellers of smuggled or prohibited goods.

*Bankruptcy* we have spoken largely of already, page 174. f. 10. of course it is unnecessary to repeat it here: but we may subjoin under this head, that by 32 Geo. II. c. 28. if a prisoner, charged in execution for any debt under a hundred pounds, neglects or refuses on demand to discover and deliver up his effects for the benefit of his creditors, he is guilty of felony, and is punishable with transportation for seven years.

*Usury* is the taking unlawful interest for the loan of money, of this also we have treated largely, page 169. f. 3. to 172. where we observed, that the legal interest is five *per cent.* in England, and six *per cent.* in Ireland, and all contracts for taking more are void, and the lender shall forfeit treble the sum borrowed: also if any scrivener or broker takes more than five shillings *per cent.* for procuring money, or more than one shilling for making a bond, he shall forfeit twenty pounds, with costs, and shall suffer imprisonment for half a year. By 17 Geo. III. c. 26. to take more than ten shillings *per cent.* for procuring any money to be advanced on any life annuity, is an indictable misdemeanour, and punished with fine and imprisonment; so also is the procuring or soliciting any minor to grant any life annuity, or to promise or otherwise engage to rectify it when he comes of age.

*Cheating*, if indicted, as it may be, at Common Law, is punishable by fine and imprisonment, though the readier and more usual method is by levying, on a summary conviction, by distress and sale, the forfeitures inflicted by the many acts of parliament passed to punish frauds



in trades and traders. Under this head may be reckoned breaking the assize of bread, or the rules respecting its price and quantity laid down by law, and the offence of selling with false weights and measures. Any deceitful practice by cozening another by artful means, whether in matters of trade or otherwise, as by playing with false dice, or the like, is punishable with fine, imprisonment, and pillory. And by 33 Hen. VIII. c. 1. & 30 Geo. II. c. 24. if any man defrauds another of any valuable chattels, by colour of any false privy token, counterfeit letters, or false pretence, or pawns or disposes of another's goods without the consent of the owner, he shall suffer such punishment by imprisonment, fine, pillory, transportation, whipping, or other corporal pains as the court shall direct. In such impositions and deceits, where common prudence may guard persons against their suffering from them, as selling sixteen gallons of beer for eighteen; selling an unsound horse for a sound one, and the like, the party aggrieved is left to his civil remedy for redress, such offences not being indictable. *Burrow. Mansfield.* 1125.

*Forestalling* the market, that is, buying or contracting for any merchandize or provisions coming in the way to market; dissuading persons bringing their goods or provisions there; or persuading them to enhance the price when there, thus making the market dearer, is an offence at Common Law, and punishable with discretionary fine and imprisonment. So is

*Regrating*, that is, enhancing the price of provisions, by bringing of corn or other dead provisions in any market, and selling it again in the same market, or within four miles of the place.

*Engrossing* also is a crime at Common Law of equal due, and equal punishment: this is buying up large quantities of corn or other dead provisions, designing to sell them again. So also is engrossing any other commodity, with an intent to sell it at an unreasonable price.

*Monopoly*, in other branches of trade, is a similar offence to engrossing in provisions. By 21 Jac. I. c. 3. monopolies are declared contrary to law, and void (except as to patents not exceeding the grant of fourteen years, to the authors of new inventions, and except also patents concerning printing, saltpetre, gun-powder, great ordnance, and shot) the punishment for which is forfeiture of treble damages and double costs to those whom they attempt to disturb; and if monopolists procure any action brought against them for these damages,

to



to be stayed by any extrajudicial order, other than that of the court wherein it is brought, they incur the penalties of a *præmunire*. Combinations of victuallers or artificers, to raise the price of provisions, or any commodities, or the rate of labour, are by several statutes particularly and severely punished, and by 2 & 3 Edw. VI. c. 15. generally, with the forfeiture of ten pounds or twenty days imprisonment, with an allowance only of bread and water for the first offence; twenty pounds or the pillory for the second; and forty pounds or the pillory, loss of one ear, and perpetual infamy, for the third.

*Exercising a trade* in any town, without having served an apprenticeship for seven years is, by 5 Eliz. c. 4. punishable with the penalty of forty shillings by the month.

To prevent the *seduction* or *transportation* of artists, which is considered as destructive of our home manufactures, it is enacted by 5 Geo. I. c. 27. that such as so entice or seduce them shall be fined one hundred pounds, and be imprisoned three months; and for the second offence shall be fined at discretion, and be imprisoned a year: and the artificers so going into foreign countries, and not returning within six months after warning given them by the British ambassador where they reside, shall be deemed aliens, and forfeit all their lands and goods, and shall be incapable of any legacy or gift. By 23 Geo. II. c. 13. the seducer incurs a penalty of five hundred pounds for each artificer contracted with to be sent abroad, and twelve months imprisonment for the first offence: and one thousand pounds and two years imprisonment for the second. And by the same statute connected with 14 Geo. III. c. 71. if any person exports any tools or utensils used in the silk, linen, or cotton, woolen manufactures, (excepting wool cards to North America, 15 Geo. III. c. 5.) he forfeits the same, and two hundred pounds; and the captain of the ship (having knowledge thereof) one hundred pounds: and if any captain of a King's ship, or officer of the customs, knowingly suffers such exportation, he forfeits one hundred pounds, and his employment, and is for ever made incapable of bearing any public office; and every person collecting such tools or utensils, in order to export the same, shall, on conviction at the assizes, forfeit such tools, and also two hundred pounds.

4. The fourth class of offences under this head are those against the public health, of which there are only two; breaking of quarantine, and selling unwholesome provisions.

The



The first is a felony without clergy. By 1 Jac. I. c. 31. if any person infected with the plague, or dwelling in an infected house, be commanded by the mayor or constable, or other head officer of his town or vill, to keep his house, and shall venture to disobey it, he may be enforced by the watchmen appointed on such melancholy occasions, to obey such necessary command: and if any hurt ensue by such enforcement the watchmen are thereby indemnified. And farther, if such person, so commanded to confine himself, goes abroad, and converses in company, if he has no plague-sore upon him, he shall be punished as a vagabond by whipping, and be bound to his good behaviour; but if he has any infectious sore upon him uncured, he shall then be guilty of felony. The statutes of 26 Geo. II. c. 6. and 29 Geo. II. c. 8. regulate the mode of performing *quarantine*, making the masters of ships coming from infected places, and disobeying the directions there given, or having the plague on board and concealing it, guilty of felony without benefit of clergy. The same punishment is inflicted also on persons escaping from the lazarets or places wherein quarantine is to be performed; and on officers and watchmen neglecting their duty; and on persons conveying goods and letters from ships performing quarantine.

By 51 Hen. III. st. 6. c. 7. the sale of *corrupted wine*, contagious or *unwholesome flesh*, or fish bought of a Jew, is prohibited on pain of amercement for the first offence; pillory for the second; fine and imprisonment for the third; and abjuration of the town for the fourth. And by 12 Car. II. c. 25. s. 11. any brewing or adulteration of wine is punishable with the penalty of one hundred pounds, if done by the wholesale merchant, and forty pounds if done by the vintner or retail trader.

5. The last class of offences under such as affect the public, are those against the *police* or œconomy, that is, the due reputation and domestic order of the kingdom. These are clandestine marriages, bigamy, soldiers or sailors wandering, gipsies wandering, common nuisances, idleness, luxury, gaming, and killing game.

With respect to *clandestine marriages*, by 26 Geo. II. c. 33. to solemnize marriage in any other place besides a church or public chapel, wherein banns have been usually published, except by licence from the archbishop of Canterbury, or in such church or chapel without due publication of the banns, or proper licence, renders the marriage void,



void, subjects the minister solemnizing it to felony punishable by transportation for fourteen years; and, by former statutes, he and his assistants to a penalty of one hundred pounds. To make a false entry in a marriage register; to alter it when made; to forge or counterfeit such entry, or a marriage licence, to cause or procure, or act or assist in such forgery; to utter the same as true, knowing it to be counterfeit; or to destroy or procure the destruction of any register, in order to vacate any marriage, or subject any person to the penalties of this act, makes the party guilty of felony without benefit of clergy.

*Bigamy* or *polygamy*, that is, having more wives or husbands than one at one time is felony. By the Ecclesiastical Law a second marriage, the former husband or wife being living, is void. By 1 Jac. I. c. 11. if any person being married, do afterwards marry again, the former husband or wife being alive, it is felony, but within benefit of clergy. In this case, the second wife may be admitted as a witness against the husband, she being in fact no wife; and *vice versa*, so may the husband. This act, however, has the five following exceptions, in which such second marriage, (though in the first three it is void) is not felony. 1. Where either party hath been continually *abroad* for seven years, whether the party in England hath notice of the other's being living or no. 2. Where either of the parties hath been absent from the other seven years *within* this kingdom, and the other party hath had no knowledge of the other's being alive within that time. 3. Where there is a divorce (or separation *a mensa et thoro*) by sentence in the ecclesiastical court. 4. Where the first marriage is declared void by any such sentence, and the parties loosed *a vinculo*. Or, 5. Where either of the parties was under the age of consent at the time of his marriage; as in this case the second marriage declares a non-assent of one of the parties, of course, renders the first marriage void: unless at the age of consent the parties had agreed to the marriage; this would have completed the contract, and consequently such second marriage, it is apprehended, would fall within the intention and penalties of the act.

It is rather a severe law, but *soldiers* and *mariners* idly *wandering* about the country, or persons pretending to be soldiers or mariners, not having a testimonial or pass from a justice of the peace, limiting the time of their passage; or exceeding the time limited, unless they fall sick on the road; or forging such testimonial, are, by 39 Eliz.



c. 17. guilty of felony without benefit of clergy. But if any honest freeholder, or other person of substance, will take such wandering soldier or mariner into his service, and he abides in the same for one year; unless licensed to depart by his employer (who in such case shall forfeit ten pounds), he shall be exempted from the penalty of this act.

By 1 & 2 Ph. & M. c. 4. and 5 Eliz. c. 20. if any persons falling under the denomination of *gypsies* or Egyptians, that is, persons using no craft nor feat of merchandize, but going about from shire to shire and place to place in great companies, and using great, subtle, and crafty means to deceive the people, bearing them in hand, that they by palmestry could tell men's and women's fortunes; and so many times by craft and subtlety have deceived the people of their money, and also have committed many heinous felonies and robberies. If any such persons shall be imported into this kingdom, the importer shall forfeit forty pounds. And if the Egyptians themselves remain one month in this kingdom; or if any person being fourteen years old (whether natural born subject or stranger) which hath been seen or found in the fellowship of such Egyptians, or which hath disguised him or herself like them, shall remain in the same one month, or at several times, he shall be adjudged guilty of felony without benefit of clergy.

*Common nuisances* are a public offence, being either the doing of a thing to the annoyance of the people in general, or the neglecting to do a thing which the common good requires; such are obstructing or omitting to repair highways, bridges, and public rivers; for which the persons, so obstructing, or omitting to repair when they ought, are indictable, or presentable to a judge of assize, or justice of the peace. What private nuisances are, have been shewn in page 225. All such nuisances, as, when injurious to private persons are actionable, *viz.* offensive trades and manufactures, are, when detrimental to the public, punishable by public prosecution, and subject to suppression and fine according to the misdemeanor. The trade of a *tallow-chandler, brewer, &c.* in a town is deemed a nuisance; so is a *glass-house*, or a manufactory for making *noisome* and *offensive* liquors, as spirit of sulphur, oil of vitriol, and the like. 1 Haw. 199. Burrow. Mansfield, 333. Keeping of *hogs* in any city or market town is a public nuisance; so are all disorderly *inns* or *alehouses, bawdy-houses, gaming-houses*, unlicensed stage-



*stage-plays*, booths and stages for *rope-dancers*, *mountebanks*, and the like. Inns indeed, being intended for the lodging and reception of travellers, may be indicted, suppressed, and fined, if they refuse to entertain a traveller without very sufficient cause. By 10 & 11 W. III. c. 17. all *lotteries* are declared to be public nuisances, and all grants, patents, or licences for the same, to be contrary to law. By 9 & 10 W. III. c. 7. making and selling of *fireworks* and *squibs*, or throwing them about in the street, is, on account of their danger, deemed a common nuisance, and of course punishable by fine. And by 12 Geo. III. c. 61. making, keeping, or the carriage of too large a quantity of *gun-powder*, at one time, or in one place or vehicle, is, though not declared a common nuisance, prohibited under heavy penalties. *Eaves-droppers*, or such as listen under walls, windows, or eaves of houses, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance, presentable at the court-leet; or are indictable at the sessions and punishable by fine and finding sureties for their good behaviour. *Common scolds* are also a public nuisance to the neighbourhood; and if any woman be convicted, she shall be sentenced to the ducking-stool, that is, to be plunged in water for her punishment. Disturbing a neighbourhood, with a speaking-trumpet in the night, has been deemed a nuisance. *Str.* 704. So is a mastiff, left to go at large in the streets unmuzzled. *Burne.* Nuisance. And a monster of the human kind, shewn for money, dead or alive, has been held a misdemeanor. 2 *Cha. Ca.* 110. A master is indictable for a nuisance done by his servant. *Ld. Ray.* 264. And the court never admits a person convicted of a nuisance to a small fine, until proof is made of the nuisance being removed. *Dalt.* c. 66. An act of general pardon will discharge the fine, but not the abatement of the nuisance. 2 *Salk.* 458.

*Idleness* also is a high offence against public œconomy. By 17 Geo. II. c. 5. idle and disorderly persons are punishable with one month's imprisonment in the house of correction; rogues and vagabonds, with whipping and imprisonment, not exceeding six months; and incorrigible rogues with whipping and imprisonment, not exceeding two years. Breach and escape from confinement in one of an inferior class ranks him among incorrigible rogues, and in a rogue (before incorrigible) makes him guilty of felony, and subject to transportation for seven years: and persons harbouring vagrants are subject to a penalty



of forty shillings, and all expences brought upon the parish thereby. Idle and disorderly persons are as follow, *viz.* persons threatening to run away and leave their wives and children to the parish; persons returning unlawfully, without a certificate, to a place from which they have been legally removed by two justices; persons who live idle, refusing to work for customary wages, and have not wherewithal to maintain themselves with, and beggars. 17 Geo. II. c. 5. Also by the same statute rogues and vagabonds are as follow, *viz.* persons gathering alms under pretences of loss by fire, or other casualty; persons collecting from prisons, gaols, or hospitals; fencers; bearwards; strolling players, or fiddlers; juglers; gipsies; fortune-tellers; gamblers; persons running away from their wives and children, leaving them to the parish; pedlars not licensed; persons wandering about, lodging in barns, &c. not giving a good account of themselves; wandering soldiers and seamen, without certificates, and all other wanderers and beggars. Incorrigible rogues are, by the same act, *viz.* end-gatherers offending against the 13 Geo. I. c. 23. such as collect ends of yarn or the refuse pieces of woollen goods, which the law punishes, to prevent abuses in the woollen manufacture; persons apprehended as rogues and vagabonds, and flying in the face of justice, or such persons escaping from prison before the expiration of their confinement, and all rogues and vagabonds convicted of a second offence. By 17 Geo. II. c. 5. s. 5. ten shillings reward is allowed to private persons for apprehending any rogue or vagabond; and a penalty of ten shillings is inflicted on such as neglect to apprehend them, when ordered by a magistrate.

*Luxury*, or extravagant expences in dress, diet, &c. may be classed also under the head of public œconomy. Formerly there were many laws to restrain excess in apparel as a public evil; but one respecting diet exists at present unrepealed, *viz.* 10 Edw. III. st. 3. which enacts, that no man shall be served at dinner or supper with more than two courses; except upon some great holiday there specified, in which he may be served with three. And, under this head, I'll take the opportunity to mention, that for the encouragement of fisheries and the increase of cattle, by 2 & 3 Edw. VI. c. 19. 5 Eliz. c. 5. & 38 Eliz. c. 7. no person shall eat any meat without a licence, on Fridays, Saturdays, the embering days, or in Lent, nor on any other fish day, on pain of forfeiting twenty shillings, or being imprisoned one month.

*Gaming*



*Gaming* is universally allowed to be a public evil. To restrain this, among the lower class of people, the 33 Hen. VIII. c. 9. prohibits to all but gentlemen the games of tennis, tables, cards, dice, bowls, coits, and other unlawful diversions there specified, unless in the time of Christmas, under certain pecuniary pains and imprisonment; and the same statute, with that of 30 Geo. II. c. 24. inflicts pecuniary penalties as well upon the master of any public house, wherein servants are permitted to game, as upon the servants themselves who are found to be gaming there. In more exalted life, by 16 Car. II. c. 7. if any person by playing or betting shall lose more than an hundred pounds at one time, he shall not be compellable to pay the same; and the winner shall forfeit treble the value, one moiety to the King, and the other to the informer. By 9 Ann. c. 14. all bonds and other securities, given for money won at play, or money lent at the time to play withal, shall be utterly void: all mortgages and incumbrances of lands made upon the same consideration, shall be and enure, to the use of the heir of the mortgagor: if any person at one time loses ten pounds at play, he may sue the winner, and recover it back by action of debt at law; and in case the loser does not, any other person may sue the winner for treble the sum so lost; and the plaintiff, in either case, may examine the defendant himself upon oath; (money lost at a horse or foot race falls within this act. *Str.* 1159. 2 *Wils.* 36.); and in any of these suits no privilege of parliament shall be allowed. Also if any person cheats at play, and at one time wins more than ten pounds, or any valuable thing, he may be indicted thereon, and shall forfeit five times the value, shall be deemed infamous, and suffer such corporal punishment as in case of wilful perjury. By several statutes of Geo. II. all private lotteries by tickets, cards, or dice (and particularly the games of faro, basset, ace of hearts, hazard, passage, roly-polly, and all other games with dice, except back-gammon) are prohibited on pain of forfeiting two hundred pounds by him that shall erect such lotteries, and fifty pounds a time by the players. By many statutes, also public lotteries are prohibited under heavy pecuniary penalties, unless by authority of parliament, and all kinds of ingenious devices under the name of sales or otherwise, which in the end are equivalent to lotteries. To prevent the multiplicity of horse-races, another species of gaming, by 13 Geo. II. c. 19. it is enacted, That no plates or matches, under fifty pounds value, shall be run, on pain  
of



of two hundred pounds penalty, to be paid by the owner of each horse running, and one hundred pounds by such as advertise the plate. By 18 Geo. II. c. 34. the forfeitures of the 9 Ann. may be recovered in a court of equity; and if any man be convicted upon the information or indictment of winning or losing at any sitting ten pounds, or twenty pounds within twenty-four hours, he shall forfeit five times the sum. By 9 Ann. c. 14. s. 6. two justices may examine any person reported to live by gaming, and if he does not make it appear to the contrary, may bind him to good behaviour for twelve months; and, in default of his giving sufficient security, may commit him to the common gaol till he does: and if he loses at any sitting twenty shillings, during the time he is bound, such playing shall be deemed a forfeiture of the recognizance.

With respect to killing of game, we have had occasion to mention it before, page 159. where I shewed that no qualification will entitle a man to the liberty of sporting, unless he has a grant of free-warren. Certain qualifications will indeed exempt him from the penalties of the game laws, but he will nevertheless be a trespasser, and be liable to be sued for such trespass in a court of law. The qualifications alluded to, are by the Statute Law, as follow. 1. Having a freehold estate of one hundred pounds *per annum*; 2. A leasehold for ninety-nine years of one hundred and fifty pounds a year; 3. Being the son and heir apparent of an esquire, or person of superior degree; and, 4. Being the owner or keeper of a forest, park, chase, or warren. Unqualified persons transgressing these laws by killing game, keeping engines for that purpose, or even having game in their custody; or for persons, however qualified, that kill game, or have it in possession at improper seasons of the year, or unreasonable hours of the day or night, on Sundays or on Christmas day, are subject to various pecuniary penalties and corporal punishment by different statutes, on any of which, but only on one at a time, justices of the peace may convict in a summary way, as, in most of them, prosecutions may be carried on at the assizes. And by 28 Geo. II. c. 12. no person, however qualified to kill, may sell, or expose to sale, any game, on pain of like forfeiture as if he had no qualification.

We come now to the last class of offences in our general distribution, which are punishable by the laws of this country; namely, those which in a more particular manner are injurious to individuals.

While



While injuries affect individuals only, they fall under the notion of private wrongs, a satisfaction for which was the subject of the preceding book, but when they are attended with a breach of the peace, and by their evil tendency threaten the subversion of all civil society, they become wrongs of a public nature, and the prosecution of them is always at the suit of the crown, the executory power of the law. These crimes then, against individuals, are chiefly of three kinds; 1. Against their persons; 2. Their habitations; and, 3. Their property.

I. Of crimes injurious to the persons of individuals, the principal one is homicide, that of taking away life, which no man is justifiable in depriving himself or another of. Now homicide is of three kinds; *justifiable, excusable, and felonious.*

1. Justifiable homicide may be subdivided also into three kinds; that from necessity; that for the purposes of public justice; and that for the prevention of any atrocious crime.

Such as is owing to unavoidable *necessity*, without any will, intention, or desire, and without any inadvertency or negligence in the party killing, is certainly without any degree of guilt: as, for example, where a sheriff or executioner puts a malefactor to death by virtue of his office. But to justify such homicide, the law must *require* it; of course, wantonly to kill a felon or a traitor, attainted or outlawed, uncompelled and extrajudicially, is murder; nay, if judgment of death be passed by a judge not properly authorized, such judge is guilty of murder. Legal judgment also must be executed by the proper officer or his deputy; so that was even the judge, or any other person to do it, of his own head, it would be murder. The execution must also be conformable to the sentence of the court; for should a sheriff behead one adjudged to be hanged, or hang one sentenced to be beheaded, it would be murder. The King, indeed, may remit all but the beheading in cases of treason; but this is no introduction of a new punishment; where the judgment, however, is to be *hanged*, it is held that the King cannot even order a peer to be beheaded.

Homicide is also justifiable when committed for the *purposes* or advancement of *public justice*, as, 1. Where a person assaulting or resisting is killed by an officer in the execution of his office; 2. Where a man charged with felony, and resisting, is killed by any officer or private person attempting to take him; 3. Where officers should kill any one in their endeavouring to disperse a mob, as in cases of riot.

This



This is justifiable both at Common Law, and by the riot act 1 Geo. I. c. 5. 4. A gaoler or officer, in his own defence, to prevent an escape, may justifiably kill prisoners in a gaol, or going to gaol, that assault such gaoler in office. 5. By 21 Edw. I. st. 2. & 3 & 4 W. & M. c. 10. trespassers in forests, parks, chases, or warrens, that will not surrender themselves to the keepers may be put to death. But in all these cases there must be an apparent necessity on the officer's side, *viz.* that the party could not otherwise be arrested or taken, the riot could not be suppressed, the prisoners could not be kept in safe custody, or the deer-stealers could not otherwise but escape.

Homicide committed for the prevention of any atrocious crime is also justifiable. Thus, by 24 Hen. VIII. c. 5. if any person attempts a robbery or murder of another, or attempts to break open a house in the *night-time* (which extends also to an attempt to burn it) and shall be killed in such attempt, the slayer shall be acquitted and discharged. But this statute is held not to extend to any crime unattended with force, as picking of pockets; or to the breaking open any house in the *day-time*, unless it carries with it an attempt of robbery also. A woman is justified in killing one who attempts to ravish her, so is the husband and father, a man who attempts a rape upon his wife or daughter: but not if he finds them in adultery by consent. In short, where a crime, in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting. In the cases hitherto mentioned, the killer is perfectly without blame, and is rather to be commended than censured. But,

2. Excusable homicide, though not punished by our laws, is scarcely justifiable. This is of two kinds, by accident and in self-defence.

Homicide by *accident*, is where a man doing a lawful act, without any intention of hurt, unfortunately kills another; as where the head of an ax, with which a man is at work, flies off and kills a stander-by, or where a person is accidentally killed, by a man qualified to keep a gun, and shooting at a mark; or where death is the consequence in a parent's moderately correcting its child, a master his apprentice or scholar, or an officer inflicting corporal punishment on a criminal: but if the correction be immoderate, or inflicted with improper instruments, and death ensues, the act would in some cases be manslaughter, and others, according to circumstances, murder; for immoderate cor-  
rection



rection is unlawful. Boxing and cudgelling are unlawful diversions, of course death happening from either would be manslaughter. To whip another's horse, so that he runs over a child and kills him, is held to be accidental in the rider, but manslaughter in the person who whips him. In a word, it is the lawfulness of the act that makes homicide excusable: if the act be unlawful, and death be the consequence, though no murder was designed, the crime will be manslaughter: such, for example, when it happens from throwing stones in a town, or the merciless diversion of cock-throwing. Homicide by accident presumes negligence and want of sufficient caution, of course cannot be altogether faultless.

Homicide in *self-defence* is also by our law rather excusable than justifiable. The right of natural defence does not imply a right of attacking, the laws being the proper resource for redress; no man therefore can justify the killing another in his own defence, unless certain and immediate suffering would be the consequence of waiting the assistance of the law. As homicide in self-defence generally arises from casual quarrels, and since in quarrels, both parties may be, and usually are, in some fault; if two persons fight, and one kills the other, the law will not deem the survivor entirely guiltless. Where both parties are actually fighting at the time the mortal stroke is given, the killer is guilty of manslaughter, because the act of fighting is illegal; but if the killer hath not begun to fight, or having begun, endeavours to decline, and afterwards, being close pressed by his antagonist, kills him in order to save himself, this is homicide excusable by self-defence. For a man, who kills another in a sudden quarrel, to stand acquitted, it must appear that he retreated as far as he safely or conveniently could, to avoid the violence of the attack, before he turned upon his assailant, and that not to watch his opportunity, but from a real unwillingness to shed blood: to turn thus from an enemy in the midst of an engagement would be cowardice; but the law countenances no such point of honour at any other time. Neither will the law permit a man, under the colour of self-defence, to screen himself from the guilt of murder. For if two persons *A* and *B* agree to fight a duel, and *A* makes the first attack. Though *B* retreats as far as he safely can, and then kills *A*, it is murder, because of the preconcerted design. But should *A*, upon a sudden quarrel, assault *B* first, and on *B*'s returning the assault, absolutely fly from *B*, but



being driven to the wall turn again and kill *B*, some are of opinion, it would be excuseable homicide, though others have thought differently, as the extremity to which *A* was reduced arose from his own fault. Masters and servants, parents and children, husbands and wives, being allowed to stand upon the reciprocal defence of each other, either killing an assailant in the necessary defence of the other respectively, will be homicide excuseable or *se defendendo*.

Where, in the case of two persons shipwrecked, and getting on the same plank incapable of saving them both, one shall thrust the other off, whereby he is drowned, the great law of self-preservation will justify the act. But,

3. Felonious homicide is of a very different nature, and this whether it be the murder of one's self or another.

Suicide or self-murder, though coroner's juries are erroneously too apt to suppose it an evidence of insanity, (for if every man who acts contrary to reason, may be presumed to have no reason, every other criminal might equally be deemed *non compos*;) is a crime too frequently committed with cool deliberation. Nay, if a lunatic kills himself in a lucid interval, he is *felo de se*, and as much guilty of self-murder as another man. No one has a right to take away his own life, it being a presumptuous rushing into the presence of the Almighty uncalled for, and an offence against the King, who hath an interest in the preservation of all his subjects, of course it is punishable by human laws, and with us is a species of felony committed on one's self. It even, like other felonies, admits of accessories before the fact; for if one man persuades another to kill himself, and he does it, the persuader is guilty of murder. If a man attempting to kill another, runs upon the sword of his antagonist; or shooting at another, the gun bursts and kills himself; from the unlawfulness of the act, he is a *felo de se*. But the party must be of years of discretion and in his senses, or else it is no crime.

The punishment inflicted on a self-murderer, he having withdrawn himself from the reach of human laws, can be only on his reputation and property. The law ordains that he be ignominiously buried in the highway, with a stake driven through his body, and that his goods and chattels be forfeited to the King. And this forfeiture takes place at the time of the act done in the felon's life-time. So that if *A* and *B* be joint-tenants of a term of a years in land, and *A* drowns himself, the land shall be forfeited to the King, and *B* shall not have it by survivorship: as the King claims from *A*'s throwing himself



himself into the water; whereas *B*'s claim could accrue only at the instant of *A*'s death. By the rubrick of the Common-prayer before the burial service, (confirmed by 13 & 14 Car. II. c. 4.) persons who have laid violent hands upon themselves shall not have that office used at their interment.

In killing another person, there are two degrees of guilt dividing the offence into *manslaughter* and *murder*. Manslaughter (when voluntary) arises from the sudden heat of the passions, murder from the wickedness of the heart.

*Manslaughter* is defined to be the unlawful killing of another, without any kind of malice, and may be either voluntary, upon a sudden quarrel, or involuntary, in the commission of some unlawful act.

First, for the *voluntary* branch, if two persons fight upon a sudden quarrel, and one kills the other, it is manslaughter, and it is equally so, if, on such a quarrel, they (each fetch their swords, 3 *Inst.* 51. 2 *H. H.* 453. and) go immediately out into a field and fight, this being construed a continued heat of the same passion. So, if a man be greatly exasperated, as by pulling his nose, or some other great indignity, and instantly kills the aggressor; it would be manslaughter: for there being no necessity to kill the assailant in self-preservation, it could not be deemed *se defendendo*. But in all homicides on provocation, if there be time for the passion to cool, and reason to interpose, (such as agreeing to go out the next day. 3 *Inst.* 51. 1 *H. H.* and the person so provoked should kill the aggressor afterwards, it would be held a deliberate revenge and murder. If a man finds another in the act of adultery with his wife, and kills him instantly, it is manslaughter, but it is so low a degree of the crime, that in a case of this kind, the court ordered the burning to be lightly inflicted, as there could not be a greater provocation.

*Involuntary* manslaughter arises from the commission of an unlawful act, or a lawful act done in an unlawful manner. If a man in boxing or cudgelling with another, kills his antagonist, it is manslaughter, because the act of boxing or cudgelling is unlawful. If a workman flings a stone or piece of timber from a house-top into the street, and kills a man below, it may be accident, manslaughter, or murder, according to the circumstances. If he did it in a country village, where few passengers are passing, calling out to all people to have a care, it would be deemed an accident; but was such a thing



to happen in London or other populous town, where numbers are passing and repassing, it would be manslaughter, even though he gave loud warning; but again, should he know of their passing and give no warning at all, he would be adjudged guilty of murder, it being malice against all mankind. In short, where involuntary killing happens in consequence of an unlawful act, it will be either manslaughter or murder, according to the circumstances of the act done: if it is in the prosecution of a felonious intent, or in its consequence tended to bloodshed, it would be murder; but was no more intended than a trespass, it will be only manslaughter. By 10 Geo. II. c. 31. however, to prevent accidents on the water, it is enacted, That if any waterman, between Gravesend and Windsor, receives into his boat or barge a greater number of persons than the act allows, and any passenger shall then be drowned, such waterman is guilty, not of manslaughter only, but felony, and shall be transported.

Though the crime of manslaughter amounts to felony, it is within the benefit of clergy, and the punishment is burning in the hand, and forfeiture of goods and chattels. But there is one species of manslaughter from which the benefit of clergy is taken away: for, by 1 Jac. I. c. 8. where one thrusts or stabs another, not then having a weapon drawn, or who hath not then first stricken the party stabbing, so that he dies thereof within six months after, the offender shall not have the benefit of clergy, though he did it not of malice aforethought. This statute was made on account of the frequent stabbing with short daggers, on quarrels between the Scotch and English at the accession of James I. and should have expired with the mischief; but the humanity of the law so favourably construes this statute, when in behalf of the offender, and so strictly when against him, that stabbing now stands almost as it did at Common Law. For stabbing an adultress is deemed manslaughter only; and if the person killed had struck at all before the mortal stroke given, though in the preceding quarrel the stabber might have given the first blow, yet it is held not to fall within this statute. So it has been resolved, that killing by throwing a hammer, or other blunt weapon, is not within the statute, and it is doubted whether a shot with a pistol be so or not. But if the person killed had a cudgel in his hand, or had thrown a pot or a bottle, or discharged a pistol at the person stabbing, he is held to have a weapon drawn on his side, within the words of the statute.

We



We are now to consider the crime of deliberate *murder*, which is thus described. When a person of sound memory and discretion unlawfully kills any reasonable creature in being, and under the King's peace, with malice aforethought, either express or implied.

Lunatics and infants are incapable of committing murder, unless in cases where they shew a consciousness of doing wrong, and of course a discernment between good and evil: but drunkenness is no excuse: nor lunacy, if the act be committed in a lucid interval.

To constitute murder it must be also without warrant or excuse; and the party must be actually dead; for a bare assault with a design to kill is only a great misdemeanor. There are various modes of killing; but if a person be indicted for any one mode, suppose *poisoning*, he cannot be convicted by evidence of a totally different mode, as for example, *shooting* or *starving*: but where they differ only in circumstances, as if the wound be alledged to be given with a sword, and it turns out to have been with a knife, an ax, or a staff, the difference is immaterial. If a man does any act of which the probable consequence may be, and eventually is, death, such killing may be murder, though no stroke be struck by himself, or any murder intended, as in the cases to be found in our law books; where an unnatural son exposed his sick father to the air against his will, of which he died; where a harlot laid her child under leaves in an orchard, and a kite struck it and killed it; and where certain parish officers shifted a child from parish to parish till it died for want of care and sustenance. If a man who has a beast used to do mischief, and he, knowing it, *suffers* it to go abroad, and it kills a person, he is guilty of manslaughter; but if he designedly *turned it loose*, though it be barely to make what is called sport, it is murder. If a regular physician or surgeon gives his patient a draught or plaister in order to cure him, and it unfortunately kills him, it is deemed only accident, however he may be liable to a civil action for his neglect or ignorance; but if he be not regularly bred, he will be guilty of manslaughter at the least. To make the killing murder, the party must die within a year and a day after the injury received, and in the computation, the whole day on which the hurt was given shall be reckoned the first.

To kill a child in its mother's womb is not murder, but a great misprision; but if the child be born alive, and dies of the potion or bruises it received in the womb, it is held to be murder in such as  
administered



administered the potion or gave the bruises. By 21 Jac. I. c. 27. if any woman be delivered of a child, which, if born alive, should by law be a bastard, and endeavours privately to conceal its death, by burying the child or the like, the mother so offending shall suffer death as in the case of murder, unless she can prove, by one witness at least, that the child was actually born dead: but from the severity of this statute, it has been customary of late years to require some kind of presumptive evidence, that the child was born alive, before the other constrained presumption (that the child whose death is concealed was therefore killed by its parent) is admitted to convict the mother. A woman's confessing herself with child before delivery, or calling or knocking for help in child-birth, will relieve her from this statute; if nothing appears to prove that the child was born alive. 2 *Haw.* 438.

Lastly, to make killing murder, it must be committed with malice aforethought; and it may be either expressed or implied. Express malice is from deliberation and design; and this takes in the case of duelling, where both parties meet with a murderous intent. Also, if one, upon a sudden provocation, beats another in a cruel manner till he dies, though he did not intend to kill him, the law deems it done by express malice, or evil design (the true sense of the word *malitia*) and adjudges it murder: as in the following cases of notoriety; when the following persons were thus killed; by a park-keeper's tying a boy, that he found stealing wood, to a horse's tail, and dragging him along the park; by a master beating his servant with an iron bar in order to correct him; and by a schoolmaster stamping upon his scholar's belly. The man also is guilty of murder who goes deliberately among a crowd of people with a horse used to strike, or who fires a gun coolly among them, provided death be the consequence; this being universal malice. So a man, on a parity of reasoning, if he resolves to kill the next man he meets, and does it, though he does not know him: and if two or more meet to do an unlawful act, of which the probable consequence might be bloodshed; as to beat a man, commit a riot, rob a park, and one of them kills a man; it is murder in them all, because of the unlawfulness of the act, and the evil intended beforehand.

Implied malice, is where no particular enmity can be proved, as where one man wilfully poisons another. No affront, by words or gestures only, is sufficient provocation, so as to excuse or extenuate such acts of violence as endanger life; of course, if a man kills another suddenly,



suddenly, without any, or without a considerable provocation, the law implies malice. But if the person so provoked had unfortunately killed the other, by beating him so as only to shew he meant to chastise him, and not to kill him, the law adjudges it to be manslaughter only; but if the beating was severe and in cool blood, by way of revenge, it is murder. 1 *Haw.* 83. So if one kills an officer of justice in the execution of his duty, or any of his assistants, endeavouring to preserve the peace, or any private person striving to suppress an affray, or apprehend a felon, knowing his authority or the design with which he interferes, the law implies it to be malice, and the killer will be guilty of murder. Also where a prisoner dieth by the duress of the gaoler, the law implies malice, by reason of the cruelty. 3 *Inst.* 52. And if one designs to commit felony, and unintentionally kills a person, it is murder. Thus, if *A* shoots at *B*, and misses him, but kills *C*, it is murder, because of the previous felonious intent. It is the same, if *A* lays poison for *B*, and *C* takes it, and it kills him, though *A* had no malice against *C*. So also if one gives a woman with child a medicine to procure abortion, and it operates so violently as to destroy the woman, it is murder in the person who gave it. In a word, all homicide amounts to murder, unless justified by the command or the permission of the law, excused on the account of accident or self-defence, or alleviated into manslaughter by the circumstances we have mentioned, which circumstances of justification, excuse, or alleviation, it is incumbent on the prisoner to make out to the satisfaction of the court and jury.

The punishment for murder is by 25 *Geo.* II. c. 37. That the judge who tries the prisoner, shall pronounce sentence immediately after conviction, unless he sees cause to postpone it; and shall in passing sentence direct him to be executed on the next day but one (unless the same shall be Sunday, and then on the Monday following) and that his body be delivered to the surgeons to be dissected and anatomized; and that the judge may direct his body to be afterwards hung in chains, but in no wise to be buried without dissection, and during the interval between sentence and execution, the prisoner shall be kept alone, and sustained with only bread and water. But the judge on good and sufficient cause is empowered to respite the execution and relax the other restraints of this act.



A fervant killing his master (whether he lives with him, or has left him, in a grudge conceived against him during his service) a wife her husband (though divorced *a mensâ et thoro*) or a clergyman his diocesan, metropolitan, or bishop that ordained him, is by 25 Edw. III. c. 2. guilty of petty treason; the punishment for which is, in a man, to be drawn and hanged; in a woman, to be drawn and burned. A person indicted for petit treason, may be acquitted thereof, and yet found guilty of manslaughter, or murder.

Other crimes against the persons of individuals, are nine, *viz.* Mayhem; Stealing an heiress; Rape; Sodomy; Assaults; Batteries; Wounding; False imprisonment; and Kidnapping; the first four are felonious, the rest merely misdemeanors.

1. *Mayhem*, or maiming, as a civil injury, was considered in the preceding book, page 213; but as a breach of the peace, and of course criminal, it remains to be treated of here. We before defined mayhem to be violently depriving a man of the use of such of his members, as render him less able to defend himself, and annoy his adversary; such a castration; disabling a man's hand or finger; or striking out his eye or fore-tooth: the punishment for which at Common Law is only fine and imprisonment; but castration is held to be felony. Cutting off his ear or nose, as they do not weaken a man, are not considered as mayhem at Common Law.

By 5 Hen. IV. c. 5. to cut out a man's tongue or put out his eyes, if done of malice prepenſe (which, as Sir Edward Coke explains it, is voluntarily and of set purpose, though done upon a sudden occasion) is felony. This statute was passed to punish those robbers who did those cruel acts, to prevent the persons they robbed from being evidence against them. By 37 Hen. VIII. c. 6. if a man shall maliciously cut off the ear of any of the King's subjects, he shall not only forfeit treble damages to the party grieved, to be recovered by action of trespass at Common Law, but also ten pounds by way of fine to the King. But by the 22d and 23d Car. II. c. 1. called the Coventry act, being occasioned by an assault on Dr. John Coventry, it is enacted, That if any person shall of malice aforethought, and by lying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or disable any limb or member of any person, with intent to maim or disfigure him, such person, his counsellors, aiders, and abettors, shall be guilty



guilty of felony without benefit of clergy. If a man attacks another with an intent to murder him, and he does not murder, but only maims him; the offence is nevertheless within this statute. 1. *Haw.*

112. And by 9 Geo. I. c. 22. to shoot at any person in any dwelling-house or other place, wilfully and maliciously, is also felony without benefit of clergy. Every man being under the protection of the law, to the end that he may serve his King and country, if a man maims himself, for a better pretence to beg, or that he may not be impressed for a soldier, he may be indicted and fined. 1 *Inst.* 127.

2. *Stealing an heiress* is also a felonious offence; for by 3 Hen. VII. c. 2. If any person shall for lucre take any woman, being maid, widow, or wife, and having substance either in goods or lands, or being heir apparent to her ancestors, contrary to her will, and afterwards shall be married to such misdoer, or, by his consent, to another, or defiled; such person, his procurers and abettors, and such as knowingly receive such woman, shall be deemed principal felons; and by 39 Eliz. c. 9. with their accessaries *before* the fact, shall not have the benefit of clergy.

In the construction of this statute it hath been determined, that no taking away falls within the act, unless the woman is heir apparent, or has substance either real or personal, and unless it be against her will; and it must also appear that she was afterwards married or defiled; and it is held, that though the marriage or defilement might be by her subsequent consent, yet if the first taking away was against her will, it is felony; and also, if she be originally taken with her own consent, yet if she afterwards refuse to continue with the taker and be forced against her will, she may from that time, as properly be said to be taken against her will, as if she had never given her consent at all, for till she was forced, she was mistress of her own actions. The evidence of a woman thus taken away and married, is admitted against her husband, he not being her legal husband.

By 4 & 5 Ph. & M. c. 8. if any person, above the age of fourteen, unlawfully shall convey or take away any woman child unmarried (bastard or not) within the age of sixteen years, from the possession and against the will of the father, mother, guardian, or governors, he shall be imprisoned two years, or fined at the discretion of the justices: and if he deflowers such maid or woman child, or without the consent of parents contracts matrimony with her, he shall be imprisoned



five years, or fined at the discretion of the justices, and she shall forfeit all her lands to her next of kin, during the life of her said husband. But this latter part of the act is now rendered almost useless, by a late statute of Geo. II. See page 84, sect. 3.

3. Rape or the carnal knowledge of any woman above twelve years of age forcibly against her will, is by 18 Eliz. c. 7. felony without benefit of clergy; as is also the wickedness of carnally knowing or abusing any woman child under the age of ten years, let it be with her consent or without. But carnally knowing a woman child between the ages of ten and twelve, either with her consent or without, by 3 Edw. I. Westm. 1. c. 13. subjects the offender to two years imprisonment, and a fine at the King's will. The offence of rape is no way mitigated, by shewing that the woman at last yielded to the violence, if such her consent was forced by fear of death or duress; nor is it any excuse that she consented after the fact.

A male child under the age of fourteen years, is not supposed capable to commit a rape, and therefore cannot be punished for it. And it is held to be felony to force even a common prostitute, as she may have forsaken that course of life.

In trials for rape, the evidence for the party ravished is admitted as competent, but the credibility of such evidence rests with the jury; whose duty it is to enquire minutely into her character; not to give much credit to a stale story; to examine whether she made any outcries; whether she discovered the offence soon after, and sought out the offender to punish him; and whether the offender fled, &c. in order to corroborate her evidence; for though rape is a most detestable crime, and ought to be severely and impartially punished, it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent. If the rape be on an infant under twelve years of age, her evidence may still be admitted on oath, if she knows the nature of an oath, and even if she does not, she may be heard unsworn, though this alone is not sufficient to convict the offender; nay the law allows what the child told her mother or other relations, to be given in evidence, as the case admits frequently of no better proof.

4. In *sodomitical* practices, or the crime against nature, committed either with man or beast, it ought to be strictly and impartially proved; and if proved, as strictly and impartially punished. Both parties,



parties, if arrived at the age of discretion, are equally punishable, and by 5 Eliz. c. 17. are guilty of felony without benefit of clergy.

5, 6, 7. The next offences are misdemeanors only. *Affaults, batteries, and wounding*, have been already considered as injuries, for which satisfaction may be obtained in a court of law (see page 212, f. 2.) but considered as a breach of the peace, they are indictable and punishable with fines and imprisonment, and if committed with any very evil design, with other ignominious corporal penalties. For example, intentional assaults to commit rape or sodomy, are usually punished with heavy fines, imprisonment, and pillory.

There is, however, one species of battery more penal than the rest, which is, beating or assaulting a clergyman. By 9 Edw. II. c. 3. if any person lay violent hands upon a clerk, the amends for the peace broken shall be before the King, that is, by indictment in the King's courts: and the assailant may also be sued before the bishop, that excommunication or bodily penance may be imposed; which if the offender will redeem with money, to be given to the bishop or the party grieved, it may be sued for before the bishop. So that a person guilty of such brutal behaviour to a clergyman is subject to three kinds of prosecutions for one and the same offence; on indictment for a breach of the peace, or such assault and battery, a civil action for the damage sustained; and a suit in the ecclesiastical court, where penance will be enjoined, and then again for such sum of money as shall be agreed on for taking off the penance.

8. For *false imprisonment*, the party injured may have redress by a suit at law, as hath been shewn page 218; but as a breach of the peace, the offender may be indicted at the suit of the King, and punished by fine and imprisonment. And by 43 Eliz. c. 13. To carry any one by force out of the four northern counties, or imprison him within the same in order to ransom him, or make spoil of his person or goods, is felony without benefit of clergy in the principals, and all accessories before the fact.

9. *Kidnapping*, or the forcible stealing away man, woman, or child from their own country, and sending them into another, the Common Law punishes with fine, imprisonment, and pillory. And by 11 & 12 W. III. c. 7. if any captain of a merchant vessel shall (during his being abroad) force any person on shore, or wilfully leave him behind, or refuse to bring home all such men as he carried out,



if able and desirous to return, he shall suffer three months imprisonment. We come now,

2dly, To treat of those offences that more immediately affect the *habitations* of individuals, and of those there are two, *Arson* and *Burglary*.

1. *Arson*, from *ardendo*, is the malicious and wilful burning the dwelling-house of another, or the outhouses that are parcel thereof, though not contiguous thereto, nor under the same roof, as barns and stables, and is at Common Law, a felonious offence. Setting fire to one's own house, provided one's neighbour's house is thereby burnt, but not else, is also arson in its strict sense; but by the Common Law, the wilful firing of one's own house in a town, is a high misdemeanor, and punishable by fine, imprisonment, pillory, and perpetual sureties for good behaviour. And if a landlord or reversioner sets fire to his own house, of which another is in possession by lease or grant, it is arson, for during the lease the house is the property of the tenant. Setting fire to a house, unless it absolutely burns, does not fall within the description of arson; nor even a burning, unless it be malicious. But by 6 Ann, c. 31. any servant *negligently* setting fire to a house or outhouses, shall forfeit one hundred pounds, or be sent to the house of correction for eighteen months. The punishment for arson is death, it being made by 9 Geo. I. c. 22. felony without benefit of clergy. The punishment, however, of wilful burning, whether arson or not, by several statutes, as will be shewn hereafter, is now made as extensive as the mischief.

2. *Burglary*, from *burgi latrocinium*, is breaking into a mansion-house at night, in order to commit a felony; the punishment for which is death; for though at Common Law it is felony within the benefit of clergy, it is now by 1 Edw. VI. c. 12. 18 Eliz. c. 7. and by 3 and 4 W. & M. c. 9. made felony without benefit of clergy, not only in the principals, but also in their abettors and accessories before the fact.

But to constitute this crime, it is held that under the term of nocturnal house-breaking, if there be day-light or twilight enough left to discern a man's face, it is no burglary. It must also be a *mansion* or dwelling-house, provided it be a private house, that is broken into; no distant barn, warehouse, or the like, falls within the description; nor does breaking open of houses where no man resides; but if it be  
resided



resided in sometimes, though no one be in it, it is sufficient to make it burglary; but not if the owner has quitted it, without a design to return. *Fest.* 76, 77. It is also burglary to break into a barn, stable, or warehouse, if such building be part or parcel of the dwelling-house, and within the same common fence. A chamber in a college or inn of court is deemed a mansion-house; so also is a room or lodging in any private house, if the owner doth not dwell in the house, or if he and the lodger enter by different outward doors; but not otherwise. The house of a corporation, inhabited in separate apartments by the officers of the body corporate, is the mansion-house of the corporation and not of the respective officers. But breaking into a shop, the parcel of one's mansion-house, which another hires to work or trade in, without ever sleeping in it, is not burglary; for by the lease it is severed from the rest of the house, and of course is not the dwelling-house of him who occupies the other part. Neither is it burglary to break into a tent or booth at a fair, though the owner may dwell in it; the law regarding only substantial edifices, a house, a church, the wall or gate of a town; breaking into either of which at night, is a burglarious offence.

Then again as to the *manner* in which this crime is committed. What is a breaking into? The house must be broken into and entered; though it is not necessary that both should be done at one and the same time; for if the breach be made on one night, and the entry on another, it still is burglary. The breaking must be by some breach, or at least by taking out the glass of a window or door, picking a lock, opening it with a key, lifting up the latch, or unloosing any other fastening the owner has provided. Entering by the chimney is held burglarious, that being as much closed as the nature of the thing will permit; but entering by a window or door left open is no burglary. Knocking at the door, and when opened, rushing in with a felonious intent is burglarious; so is entering a house under pretence of taking lodgings, and then robbing the landlord; or procuring a constable to gain admittance, in order to search the house, and then binding the constable and robbing the house. So if a servant opens and enters his master's chamber-door with a felonious intent; or if any other person lodging in the same house, or in a public inn opens and enters another's door with such evil design; it is deemed a burglary. Nay if a servant conspires with a robber, and lets him into the house  
by



by night, it is burglary in both. With respect to the nature of entry: any the least degree of it is held sufficient, any part of the body, or any instrument held in the hand; for example, to step over the threshold; to put a hand or a hook in at a window to draw out goods; or pistol to demand one's money, are all burglarious entries. By 12 Ann. c. 7. if a person enters into the dwelling-house of another, without breaking in, either by day or by night, with intent to commit felony; or being in such house, shall commit felony, and shall in the night break out of the same, it is burglary.

By committing felony is understood robbery, murder, rape, or any other felony; and entering with an *intent* to commit it, whether such intentions be carried into execution or not, provided it be by night, is burglary. Without such felonious intent, breaking and entry is only a trespass. But there are several statutes that make house-breaking, &c. in the day-time, felony also without benefit of clergy, as will be shewn under the head of larciny from the house. Burglary, however, in any house belonging to the plate-glass company, with intent to steal the stock or utensils, is by 13 Geo. III. c. 38. declared to be single felony only, and punishable with transportation for seven years. Where a man commits burglary, and at the same time steals goods out of the house; it is also larciny; and if he be acquitted of the burglary, he may notwithstanding be indicted of the larciny; they being different offences. 2 H. H. 246. We come,

3dly. To treat of criminal offences against private property, of which there are three, *Larciny*, *Malicious mischief*, and *Forgery*.

1. *Larciny* or *theft* from *latrocinium*, is attended with a breach of the peace, and is of two kinds, *simple* and *mixed*. *Simple* larciny is plain theft, unaccompanied with any other atrocious circumstance; which, when the goods stolen are above the value of twelve pence, is called *grand* larciny; when under that value, *petit* larciny. *Mixed* or compound larciny has all the properties of the former, but accompanied with either one or both of the aggravations of a taking from one's *house* or *person*. We will speak of them in their turns.

*Simple larciny* then is the felonious taking and carrying away of the personal goods of another. Taking here implies without the owner's consent; therefore no delivery of the goods from the owner to the offender upon trust can ground a larciny. If I lend a man a horse to go a certain distance, and he rides away with it; or if I  
send



send goods by a carrier, and he does not deliver them, this is in neither case larciny; but if the carrier opens the package, or pieces of wine I send by him, and robs me of part; or if he delivers the goods according to the directions, and then takes them away, he is guilty of larciny: so is a man, at market, that rides away with a horse, whose paces he has desired to try. *Kel.* 82. But, by 33 Hen. VI. c. 1. the servants of persons deceased, accused of embezzling their master's goods, may by writ of Chancery (issued by the advice of the chief justice and chief baron, or any two of them) and proclamation made thereupon, be summoned to appear personally in the court of King's Bench, to answer their master's executors in any civil suit for such goods; and shall in default of appearance, be attainted of felony. And by 21 Hen. VIII. c. 7. if any servant embezzles his master's goods to the value of forty shillings, it is felony; except in apprentices and servants under eighteen years of age. But if such servant was not entrusted with the possession, but only had the care of the goods, as the butler of plate, or the shepherd of sheep, &c. the embezzling them is felony at Common Law. So if a guest robs his inn or tavern of a piece of plate, it is larciny; for he hath not the possession delivered to him. So by 3 & 4 W. & M. c. 9. if a lodger runs away with the goods from his ready-furnished lodgings. If a man steals the goods he has pawned in order to defraud the pawnbroker, or robs his own messenger on the road, with intent to charge the hundred with the loss, he is as much guilty of larciny, as if the property he steals was that of another man's.

To constitute larciny, there must not only be a *taking*, but a *carrying away*, and a bare removal of the things stolen is a sufficient carrying; as if a man is apprehended in leading another's horse out of a field, or if a guest stealing goods out of an inn, had removed them from his chamber in his way out, or if a thief stealing plate from a chest, has laid it down on the floor, and was then discovered. This taking and carrying away must also be *felonious*; for should a servant take his master's horse without his knowledge, and bring it home again, or should a neighbour take another's plough which he finds in the field, and use and return it; or should a landlord distrain for rent when none is due, these would be trespasses only, but not felonies. The usual discovery of a felonious intent, is where it is clandestinely done, or where the party, being charged with the fact, denies it.

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The felonious taking and carrying away must also be of the *personal* goods of another, not any part of his *real* property, or it cannot be larciny by the Common Law. Lands, tenements, and hereditaments are not indeed in their nature removeable, but things that adhere to the freehold, as corn, grafs, trees, apples upon a tree, lead upon a house are, and yet no larciny can be committed at Common Law in these: but when severed from the freehold, as wood cut, grafs in cocks, apples gathered, &c. or if the thief sever them at one time, and steal them at another, it is larciny. 1 *Haw.* 93. 1 *H. H.* 510. Now however, by 4 Geo. II. c. 32. to steal or rip, cut or break, with intent to steal, any lead, or iron bar, rail, gate, or palisado, fixed to a dwelling-house or outhouse, or in any court or garden thereunto belonging, is felony, subject to transportation for seven years: and to steal, damage, and destroy underwood or hedges, and the like, to rob orchards or gardens of fruit growing therein, to steal or otherwise destroy any turneps, potatoes, cabbages, parsnips, peas, or carrots, or the roots of madder when growing, are by several statutes punishable by whipping, small fines, imprisonment, and satisfaction to the party wronged, according to the nature of the offence. Stealing by night any trees, roots, shrubs, or plants, to the value of five shillings, is, by 6 Geo. III. c. 36. felony in the principals, aiders, and abettors, and in the purchasers thereof, knowing the same to be stolen; and by 6 Geo. III. c. 48. and 13 Geo. III. c. 33. stealing of any timber trees therein specified, and of any root, shrub, or plant, by day or night, is subject to pecuniary penalties for the first and second offences, and is felony, and subject to transportation for seven years for the third. Stealing ore out of mines, being part of the freehold, is not larciny, except it be the ore of black lead, stealing of which or entering the mine with intent to steal it, is felony, punishable with imprisonment and whipping, or transportation, not exceeding seven years; and by 25 Geo. II. c. 10. to escape from such imprisonment, or return from such transportation, is felony without benefit of clergy. Stealing of writings belonging to a real estate is no felony, as appertaining to the freehold, but a trespass only.

At Common Law, stealing of bonds, bills, or notes, were not considered as larciny, but now, by 2 Geo. II. c. 25. they are considered as money, and it is felony to steal them. By 15 Geo. II. c. 13. officers or servants of the Bank of England, secreting or embezzling any note, bill,



bill, warrant, bond, deed, security, money, or effects, intrusted with them or with the company, are guilty of felony without benefit of clergy. By 24 Geo. II. c. 11. it is equally criminal in the officers and servants of the South Sea Company. And by 7 Geo. III. c. 50. if any officer or servant of the post-office shall secrete, embezzle, or destroy any letter or packet, containing any bank note or other valuable paper, particularly specified in the act, or shall steal the same out of any letter or packet, he shall be guilty of felony without benefit of clergy: or if he shall destroy any letter or packet, with which he has received money for the postage; or shall advance the rate of postage on any letter or packet sent by the post, and shall secrete the money received by such advancement, he shall be guilty of single felony. Stealing of treasure-trove, at Common Law, is larceny, when it has been seized by the King, or him who has the franchise, but not else; and by 26 Geo. II. c. 19. plundering or stealing from any ship in distress (whether wrecked or not) is felony without benefit of clergy.

Taking wild animals, *feræ naturæ*, unreclaimed, such as deer, hares, conies, from a forest, chase, or warren, fish from an open river or pond, or wild fowl from their natural liberty, comes not under the construction of larceny at Common Law; but if they are reclaimed or confined, and may serve for food, as deer in an enclosed park, fish in a trunk, pheasants in a mew, stealing them is larceny. And now by 9 Geo. I. c. 22. to hunt, wound, kill, or steal any deer, to rob a warren, or to steal fish from a river or pond (being armed or disguised) also (whether armed or disguised or not. *Burn.*) to hunt, wound, kill, or steal any deer in the King's forests or chases inclosed, or in any other inclosed place where deer have been usually kept; or by gift or promise of reward to procure any person to join them in such unlawful act, is felony without benefit of clergy. And by 16 Geo. III. c. 30. every unauthorized person, his aiders and abettors, who shall course, hunt, shoot at, or otherwise attempt to kill, wound, or destroy any red or fallow deer in *any* forest, chase, purlieu, or ancient walk, or in any *inclosed* park, paddock, wood, or other ground, where deer are usually kept, shall forfeit the sum of twenty pounds; or for every deer actually killed, wounded, destroyed, taken in any toil or snare, or carried away, the sum of thirty pounds, or double those sums, in case the offender be a keeper:



and upon a second offence (whether of the same or a different species) shall be guilty of felony, and be transported for seven years : likewise all persons armed with offensive weapons that shall come into such places, with an intent to commit any of the said offences, and shall there unlawfully beat or wound any of the keepers in the execution of their offices, or shall attempt to rescue any person from their custody, shall be transported for seven years. Transportation for seven years is also inflicted by 5 Geo. III. c. 14. on persons stealing or taking fish in any water within a park, paddock, garden, orchard or yard; and on the receivers, aiders, and abettors : and the like punishment, or whipping, fine, or imprisonment, on such as take or kill conies by night in any open warren : and a forfeiture of five pounds to the owner of the fishery is made payable by persons taking or destroying (or *attempting* so to do) any fish in any river or other water within any inclosed ground, being private property. If swans be lawfully marked, it is felony to steal them, though at large in a public river, or in a private river or pond though unmarked. Stealing hawks in disobedience to the rules laid down in 37 Edw. III. c. 19. is also felony. Stealing any valuable domestic animal, as horses, and other beasts of draught, and animals serving for food, as neat and other cattle, swine, poultry, and the like, and their produce while living, as milk or wool, is larciny ; and also the flesh of animals (whether wild or tame, serving for food) when killed ; but stealing animals not serving for food, as dogs, cats, &c. and other creatures kept for pleasure (though the owner may maintain a civil action against those who steal them) does not amount to larciny. But by 10 Geo. III. c. 18. stealing or knowingly harbouring a stolen *dog*, or having in one's custody the skin of a dog that has been stolen, is punishable with very high pecuniary penalties, or a long imprisonment, or whipping in their stead, may be inflicted by two justices of the peace. Stealing a shroud out of a grave, which is the property of those who buried the deceased, is also larciny ; but stealing the corpse itself, which has no owner, is not larciny, unless some of the grave-cloths be stolen with it. See page 162.

The punishment for grand-larciny, that is, if the thing stolen be above the value of twelve pence, is by the Common Law, death ; but as this standard was settled eight hundred years ago, when a fat ox could be bought for twelve pence, the mercy of juries will lead them  
often



often to bring in larciny under the value of twelve pence, when the thing stolen is in reality of much greater value. The punishment for petit-larciny, or larcinies under twelve pence, is at Common Law, whipping, or by 4 Geo. I. c. 11. may be extended to transportation for seven years. By the benefit of clergy a person convicted of simple larciny to the value of thirteen pence, or thirteen hundred pounds, though guilty of a capital offence, may for the first offence have his life spared: and in many cases of simple larciny the benefit of clergy is taken away by statute, as from the principals, and accessaries *before* and *after* the fact, in horse stealing; for theft by great and notorious thieves in Northumberland, 18 Car. II. c. 3. for taking woollen cloth from off the tenters, 22 Car. II. c. 5. But in these cases it is held that it must be grand larciny, and persons in whose custody such cloth is found, must prove their innocence, or by 15 Geo. II. c. 27. they are punishable for the first offence by forfeiture of treble the value, for the second by imprisonment also, and the third time it becomes a felony, subject to transportation for seven years. The benefit of clergy is also taken away by 18 Geo. II. c. 27. for taking linens, fustians, calicoes, or cotton goods from the place of manufacture; stealing sheep, bulls, cows, steers, bullocks, heifers, calves, and lambs, or killing them with intent to steal the whole or any part of the carcase, or aiding and assisting therein; 15 Geo. II. c. 34. for thefts in navigable rivers above the value of forty shillings, or being present, aiding, and assisting thereat; 24 Geo. II. c. 45. for plundering vessels in distress, or that have suffered shipwreck; 12 Ann. st. 2. c. 18. 26 Geo. II. c. 19. for stealing letters sent by the post; 7 Geo. III. c. 50. and also for stealing deer, fish, hares, and conies under the peculiar circumstances mentioned in the Waltham Black Act. 9 Geo. I. c. 22. Which additional severity is owing to the malice and mischief of the theft in some of these instances, and to the difficulties there would otherwise be in preserving such goods in others.

Mixed or compound larciny is of two sorts; larciny from the *House*, and larciny from the *Person*.

From larciny from the *House*, except in the instance of stealing the stock or utensils of the plate glass manufactory, which is subject only to transportation for seven years, the benefit of clergy is generally taken away, and with the following particularities: first, in



larcinies above the value of twelvepence committed. 1. In a church or chapel, with or without violence, or breaking the same. 1 Edw. VI. c. 12. 2. In a booth or tent in a market or fair, in the day or night, by violence or breaking the same; the owner or some of his family being therein. 5 and 6 Edw. VI. c. 9. 3. By breaking into and robbing a dwelling-house in the day-time, any person being therein. 3 and 4 W. and M. c. 9. 4. In a dwelling-house by day or night, without breaking the same, any person being therein and put in fear; which amounts to a robbery; and in both these last cases, 3 and 4, the accessory before the fact, is also excluded clergy. *Ditto*. Secondly, in larcinies to the value of *five shillings* committed. 1. By breaking any dwelling-house, or any outhouse, shop, or warehouse thereunto belonging, in the day-time, although no person be therein; 39 Eliz. c. 15. which now extends to aiders, abettors, and accessories before the fact: 3 and 4 W. and M. c. 9. 2. By privately stealing goods, wares, or merchandize in any shop, warehouse, coach-house, or stable, by day or by night, though the same be not broken open, and though no person be therein; which likewise extends to such as assist, hire, or command the offence to be committed. 10 and 11 W. III. c. 23. Lastly, in larcinies to the value of *forty shillings* in a dwelling-house or its warehouses, although the same be not stolen, and whether any person be therein or no (unless committed against their masters by apprentices under the age of fifteen): this also extends to those who aid or assist in the commission of the crime. 12 Ann. st. 1. c. 7.

Larceny from the *person* is of two kinds; *privately stealing* and *robbery*,

*Privately stealing* from a man's person, as by picking his pocket, or the like, without his knowledge, though a severe law, has been felony without benefit of clergy ever since 8 Eliz. c. 4. but to exclude clergy, it must be grand larceny, *viz.* above the value of twelve pence.

*Robbery* is taking from another his money or goods violently, and by putting him in fear; the punishment for which is death, it being made felony without benefit of clergy by 23 Hen. VIII. c. 1. but a mere attempt to rob, by 7 Geo. II. c. 21. is only a felony subject to transportation for seven years. Should the robber however take one's purse, it is a robbery, and death, though he should afterwards return it.



it. It is equally robbery to take any thing from a man in his presence, provided it be by menaces and violence, as to drive away his cattle before his face. The taking away a penny, equally with a pound, will make a man a robber, the sum therefore is immaterial; but privately stealing from a man's person any sum under the value of twelve pence, and keeping it afterwards by putting him in fear, is no robbery. Knocking a man down, and stripping him of his property while senseless; begging alms with a drawn sword; and forcibly extorting money under a pretence of sale, are all robberies; if a man parts with his money or property, through a mistrust or apprehension of violence. But it is doubted whether compelling a chapman to sell his wares, and giving him the full value of them, be robbery or not. Robberies formerly were not punishable with death, unless committed in a dwelling-house, or on the King's highway; but the 3 & 4 W. & M. c. 9. takes away clergy from both principals and accessories before the fact in robbery wheresoever committed.

2. The next offence against private property, which the law punishes criminally, is *malicious mischief*.

The acts of parliament on this head are as follow, in the order they were made. By 22 Hen. VIII. c. 11. maliciously to cut down or destroy the powdike in the Fens of Norfolk and Ely is felony: and it is equally so by several special acts to destroy the several sea banks, river banks, public navigations and bridges erected by virtue of those acts. By 43 Eliz. c. 13. to burn any barn or stack of corn or grain; or to imprison or carry away any subject in order to ransom him, or make prey or spoil of his person or goods upon deadly feud or otherwise, in the four northern counties of Northumberland, Cumberland, Westmorland, and Durham, or being accessory before the fact to such carrying away or imprisonment; or to give or take any money or contributions, there called *Black-Mail*, to secure such goods from rapine, is felony without benefit of clergy. By 22 & 23 Car. II. c. 7. maliciously and unlawfully in the night-time to burn or cause to be burned or destroyed any ricks or stacks of corn, hay, or grain, barns, houses, buildings, or kilns; or to kill any horse, sheep, or other cattle is felony; but the offender may make his election to be transported for seven years: and to maim or hurt such horses, sheep, or other cattle, is a trespass for which treble damages shall be recovered. By 4 & 5 W. & M. c. 23. to burn on any waste, between Candlemas and Midsummer,



Midsummer any grig, ling, heath, furze, goss, or fern, subjects the offenders to whipping and confinement in the house of correction. By 1 Ann. st. 2. c. 9. & 4 Geo. I. c. 12. captains and mariners belonging to ships, and destroying the same, to the prejudice of owners or insurers, are guilty of felony without benefit of clergy: and by 12 Ann. st. 2. c. 18. making any hole in a ship in distress, or stealing her pumps, or aiding and abetting such offence, or wilfully doing any thing tending to the immediate loss of such ship, is felony without benefit of clergy. By 1 Geo. I. c. 48. maliciously to set on fire any underwood, wood, or coppice is single felony. By 6 Geo. I. c. 23. wilfully and maliciously to tear, cut, spoil, burn, or deface the garments or cloaths of any person passing in the streets or highways, with intent so to do, is felony. By 9 Geo. I. c. 22. called the Waltham Black Act, to set fire to any house, barn, or outhouse (or by 9 Geo. III. c. 29. any kind of mill) or to any hovel, cock, mow, or stack of corn, straw, hay or wood; or unlawfully and maliciously to break down the head of any fish pond, whereby the fish shall be lost or destroyed; or in like manner to kill, maim, or wound any cattle; or cut down or destroy any trees planted in an avenue, or growing in a garden, orchard, or plantation for ornament, shelter, or profit; or to procure by gift or promise of reward any person to join therein, is felony without benefit of clergy, and the hundred shall be chargeable for the damage, unless the offender be convicted. By 6 Geo. III. c. 37. & 10 Geo. II. c. 32. maliciously to cut down any river or sea bank, whereby lands may be overflowed or damaged; or to cut any hop-binds growing in a plantation of hops, or wilfully or maliciously to set on fire, or cause to be set on fire, any mine, pit, or delph of coal, is felony without benefit of clergy. By 11 Geo. II. c. 22. to use any violence in order to deter any person from buying corn or grain; to seize any carriage or horse carrying grain or meal to or from any market or sea-port, or to use any outrage with such intent; or to scatter, take away, spoil, or damage such grain or meal, is punishable for the first offence with imprisonment and public whipping: for the second offence, or for destroying any granary where corn is kept for exportation, or taking away or spoiling any grain or meal in such granary, or in any ship, boat, or vessel, intended for exportation, it is felony, and transportation for seven years. By 28 Geo. II. c. 19. to set fire to any grafs, furze, or fern growing in any forest or chase, is subject to a penalty



a penalty of five pounds. By 6 Geo. III. c. 36 & 48. & 13 Geo. III. c. 33. wilfully to spoil or destroy any timber or other trees, roots, shrubs, or plants, is for the first and second offence subject to pecuniary penalties, and for the third in the day-time, and even for the first, if at night, the offender shall be guilty of felony, and be transported for seven years. By 9 Geo. III. c. 29. wilfully and maliciously to burn or destroy any engine or other machine, therein specified, belonging to any mine; or any fences for inclosures pursuant to any act of parliament, is single felony, and punishable with transportation for seven years, in the offender, his advisers, and procurers. And by 13 Geo. III. c. 38. the like punishment is inflicted on such as break into any house, &c. belonging to the plate-glass company, with intent to steal, cut, or destroy any of their stock or utensils, or shall wilfully and maliciously cut or destroy the same. By 37 Hen. VIII. c. 6. s. 4. wilfully and maliciously to burn or cause to be burnt any wain or cart laden with coals, or with any goods or merchandizes; or any heap of wood prepared, cut, or felled for making coals, billets, or talwood, is punishable with forfeiture of treble damages to the party grieved, and ten pounds as a fine to the King: and by the commission of the peace any justice may bind over to the peace and good behaviour, such as threaten any one verbally to burn his house. Sending threatening letters to this purpose has been shewn before to be felony without benefit of clergy, see page 296. The reader here sees, that the above acts were most of them passed to prevent a future commission of such crimes as were at that time in practice.

3. *Forgery* is the fraudulent making or alteration of a writing to the prejudice of another man's right; which at Common Law is punishable with fine, imprisonment, and pillory; but a variety of statutes have made it felony without benefit of clergy.

By 5 Eliz. c. 14. to forge or make or knowingly to publish or give in evidence any forged deed, court roll, or will, with intent to affect the right of real property, either freehold or copyhold, is punishable by a forfeiture to the party of double costs and damages; by standing in the pillory, and having both his ears cut off, and his nostrils slit and seared, by forfeiture of his lands to the crown, and by perpetual imprisonment. For any forgery relating to a term of years, or annuity, bond, obligation, acquittance, release, or discharge of any debt or demand of any personal chattels, the same forfeiture is given



to the party aggrieved; and the offender is punishable with the pillory, loss of one of his ears, and half a year's imprisonment: the second offence in both cases is felony without benefit of clergy. See below, where these offences are made death.

A multitude of special acts since the Revolution, when paper credit was first established, inflict death on the forging, altering, or uttering as true when forged, of any bank-bills, or notes or other securities; of bills of credit issued from the Exchequer; of South Sea bonds; of lottery tickets or orders; of army or navy debentures; of East India bonds; of writings under seal of the London or Royal Exchange Assurance; of the hand of the receiver of the pre-fines, or of the accountant general and certain other officers of the court of Chancery; of a letter of attorney, or other power to receive or transfer stock or annuities; and on the personating a proprietor thereof, to receive or transfer such annuities, stock, or dividends; also on the personating or procuring to be personated, any seaman or other person, entitled to wages or naval emoluments, or any of his personal representatives; or taking or procuring to be taken any false oath in order to obtain a probate or letters of administration, in order to receive such payments; and the forging or procuring to be forged, and likewise the altering or publishing, as true, of any counterfeited seaman's will or power; 31 Geo. II. c. 10. 9 Geo. III. c. 30. also on the counterfeiting of Mediterranean passes; 4 Geo. II. c. 18. forging or imitating of any stamps to defraud the public revenue, and the forging of any manuscript licence or register. All these are felonies without benefit of clergy. By 13 Geo. III. c. 52 & 59. forging or counterfeiting any stamp or mark to denote the standard of gold and silver plate, and certain other offences of the like tendency, are punishable with transportation for fourteen years. By 12 Geo. III. c. 48. certain frauds on the stamp duties therein described, chiefly by using the same stamps more than once, is felony subject to transportation for seven years. And the like punishment is inflicted by 13 Geo. III. c. 38. on such as counterfeit the common seal of the corporation for manufacturing plate-glass, or knowingly demand money of the company by virtue of any writing under such counterfeit seal.

But there are two general acts with regard to forgery. By 2 Geo. II. c. 25. forging or procuring to be forged, acting or assisting therein, or uttering or publishing as true, any forged deed, will, bond, writing obligatory,



obligatory, bill of exchange, promissory note, indorsement or assignment thereof, or any acquittance or receipt for money or goods, with intention to defraud any person (or corporation, 31 Geo. II. c. 22. s. 78.) is felony without benefit of clergy, even for the first offence. And by 7 Geo. II. c. 22. to forge or cause to be forged, or utter as true, a counterfeit acceptance of a bill of exchange, or the number or principal sum of any accountable receipt for any note, bill, or any other security for money, or any warrant or order for the payment of money or the delivery of goods, is also felony without benefit of clergy; and it is immaterial in forgeries, if they intend to defraud, whether they are in the name of a real or fictitious person.

But there is one nice determination of the judges respecting the forgery of a *warrant or order for payment of money or delivery of goods*, proper to be mentioned, on a forged order of the following kind: "Let the bearer have six yards of ordinary stuff. Geo. May." Nine of the judges were of opinion that such an order was not within the meaning of the act; the words *warrant or order* importing, that the person giving such warrant or order hath, or at least claims, an interest in the money or goods which are the subject matter of that warrant or order, and of course that he has or thinks he has a power to transfer the property; which is not the case of an order upon a shopkeeper; unless the goods in such shopkeeper's possession are the property of the person giving the order. *Fost.* 119.

We have now gone through the whole circle of crimes and misdemeanors cognizable by the laws of this country, and it appears that there is scarce a case possible to be conceived, wherein offenders are not some way or other punishable in proportion to the heinousness or aggravation of their offences.

### C H A P. III.

#### OF SURETIES FOR THE PEACE AND GOOD BEHAVIOUR.

THE requisition of security for keeping the peace and for good behaviour from such as the legislative power had reason to be suspicious of, was contrived very early, in order to prevent, if possible, the commission of crimes and misdemeanors: and surely it is an honour



to any laws to find them calculated rather to prevent future crimes than expiate the past.

This security consists in obliging the suspected person or the offender (for it is sometimes part of the penalties inflicted on past misdemeanors) to be bound, with one or more sureties, in a recognizance or obligation to the King, taken in court, or by some magistrate, and entered on record, whereby the parties acknowledge themselves indebted to the crown in the sum required, with condition to be void, if the party shall appear in court on such a day, and in the mean time shall *keep the peace*, either generally towards the King, or with regard to the person who sues for the security; or if it be for *good behaviour*, then on condition that he shall demean and behave himself well, for the time therein limited. This recognizance, if taken by a justice of the peace, must by 3 Hen.VII. c. 1. be certified to the next sessions, and if the conditions of such recognizance be broken by any breach of the peace, in the one case, or any misbehaviour on the other, the sum specified in such recognizance is forfeited, and the recognizance being sent up to the Exchequer, the party and his sureties are sued for the sums in which they are respectively bound.

The Lord Chancellor or Keeper, the Lord Treasurer, all the Justices of the Court of King's Bench, and the Master of the Rolls generally, and the other Judges in their own courts; the sheriff, the coroner, and all justices of the peace, may demand such security at discretion; or it may be granted at the request of any subject, upon due cause shewn; or if any justice is unwilling to act in this matter, application is usually made to the superior courts under direction of the 21 Jac. I. c. 8. and recognizances are taken there. A peer or peers cannot indeed be bound over any where but in the courts of King's Bench or Chancery: though a justice of the peace is authorized to require sureties of any other person (even of one another) not insane, under the degree of nobility. Husbands and wives may demand it against each other; but wives and infants under age, cannot be bound themselves, being incapable of engaging for any debt: such must give security by their friends alone.

The following circumstances will discharge a recognizance; the death of the King, to whom the obligation is made, the death of the principal party bound thereby, if not before forfeited: an order of the court, to which the recognizance is certified, if they think proper;



and the requisition of the person at whose request it was granted, or in case he does not make his appearance to pray its continuance. So far what has been said is applicable to recognizances either for the *peace* or for *good behaviour*: but these securities differ in other respects.

1. To keep the peace, any justice may bind men over, who in his presence quarrel or fight, or threaten to kill or beat another; or go about with unusual weapons or attendance to the alarm of the people; or such as he knows to be common barretors, such as are brought before him by the constable for a breach of the peace, and such as having been before bound, have broken it, and forfeited their recognizances. Also where any person hath just cause to fear, that another will burn his house, or do him a corporal injury, by killing, imprisoning, or beating him, or that he will procure others to do it; he may insist on such persons being bound over to preserve the peace, and every justice of the peace is obliged to grant it, if he demands it upon oath, alledging that he is in fear of his life or bodily harm, and that he does not require such security out of malice or mere vexation. This is called *swearing the peace* against another; and if the party does not find such sureties as the justices shall require, he may be committed till he does.

Such recognizance, if special, becomes forfeited by any actual violence, assault, or menace to the person of him who demands it: if it be general, it is forfeited by any unlawful action, that either tends to or is a breach of the peace; by a commission of the many species of offences enumerated in page 295, f. 2. to 300. or any private violence done to any man; but a bare trespass upon the lands or goods of another, unless attended with a wilful breach of the peace, does not forfeit it. Neither are mere reproachful words, calling a man a liar or a knave, any breach of the peace, unless they amount to a challenge to fight.

2. Sureties for *good behaviour* include security for the peace and something more. By 34 Edw. III. c. 1. justices are empowered to bind down to good behaviour to the King and people all that are *not of good fame* wherever found. Under which words, it is held that a man may be bound over for offences against good morals, as for haunting bawdy houses with women of bad fame, or for keeping such women in his own house; for words tending to scandalize the government, or in abuse of the officers of justice, especially in the execution of their office; for being a night-walker, an eaves-dropper, for keeping



suspicious company, such as are reported to be pilferers or robbers, for sleeping in the day and waking at night, for being a common drunkard, whore-master, the putative father of a bastard, a cheat, an idle vagabond, or for any other misbehaviour, that tends to his being thought a person not of good fame. An expression indeed that gives great latitude to magistrates; but if he commits a man for want of sureties, he must express the cause of such commitment with tolerable certainty, and must take care that such cause be a good one.

Recognizances for good behaviour may be forfeited by the same means as for the security of the peace, or by committing any of those acts of misbehaviour which the recognizance was intended to prevent; but not by barely giving fresh cause of suspicion of that which perhaps may never actually happen.

#### CHAP. IV.

#### OF THE CRIMINAL COURTS.

**H**AVING treated of crimes and their punishments, it now remains to treat of the courts where such crimes are cognizable. And here, as they have no dependence on one another, we will begin with the highest. The first of which is,

1. The high court of Parliament. An impeachment before the Lords by the Commons of Great Britain in Parliament, is a presentment to the supreme court of criminal jurisdiction by the grand inquest of the whole kingdom. A commoner cannot be impeached before the Lords for any capital offence, but only for high misdemeanors, but a peer may for any crime. In impeachments of peers for treason, the Commons usually address the King to appoint a Lord High Steward; though such appointment is not absolutely necessary, for the peers may proceed without one. Articles of impeachment are a kind of bills of indictment framed by the Commons and tried by the Lords; and by 12 & 13 W. III. c. 2. no pardon under the great seal shall be pleadable to an impeachment by the Commons of Great Britain in Parliament.

2. The court of the Lord High Steward is the next, and is a court instituted occasionally for the trial of peers, indicted for treason or felony,



lony, or for misprision of either. This High Steward must be a Lord of parliament, or he is incapable to try such delinquent peer. Before such trial, either in this court or the court of Parliament, the indictment must be found by a grand jury of freeholders in the King's Bench, or at the assizes before the justices of *oyer and terminer*, which is removed into the court of the Lord High Steward by writ of *Certiorari*; and in case of an appeal a peer shall be tried by jury. A peer may plead a pardon before the court of King's Bench, and the judges have power to allow it, in order to prevent the appointment of a Lord High Steward, but he may not plead in that court *guilty* or *not guilty*, lest judgment of death in consequence might be there passed against him. The indictment being found and removed, the High Steward directs a precept to a serjeant at arms to summon the Lords to attend the trial; and by 7 W. III. c. 3. upon all trials of peers for treason or misprision, all the peers who have a right to sit and vote in parliament shall be summoned, at least twenty days before such trial, to appear and vote therein, and every Lord appearing shall vote in the trial of such peer, first taking the oaths of allegiance and supremacy, and subscribing the declaration against Popery.

The trial of a peer during the session of parliament is not properly in the court of the Lord High Steward, though such an officer be appointed, but before the court last mentioned of our Lord the King in parliament; the Lord High Steward sitting in that court rather as a chairman of the court than as a judge, and having a vote with the rest of the Lords in right of his peerage; but in the court of the Lord High Steward, which is held always in the recess of parliament, he is the sole judge of matters of law, as the peers are in matters of fact; and of course he has no right to a vote upon the trial. Upon the conviction and attainder of a peer for murder in full parliament, it is held, that in case the day appointed in the judgment for the execution should lapse before execution done, a fresh day may be fixed, appointed by the high court of Parliament, during its sittings, though no High Steward be existing, as in the recess of parliament, by the Court of King's Bench, the record being first removed into that court.

At trials in full parliament, the Lords Spiritual, by a determination of the House of Peers, have a right to stay and sit in court in capital cases, till the court proceeds to the vote of guilty or not guilty; but  
in



in the court of the Lord High Steward, no bishop as such, ever was or could be summoned. Indeed they have no right to be tried themselves in the court of the Lord High Steward; for the privilege of being thus tried, depends upon nobility of blood, rather than a seat in the house; as appears from the trials of popish Lords, of Lords under age, and, since the Union, of the Scots nobility, though not among the sitting peers, and from the trials of the Queen Consort or Dowager, or peeresses by birth; and peeresses by marriage also, unless they have degraded themselves, when widows, by marrying a commoner for their second husband. Even in trials for capital offences in full parliament, there is no instance of the bishops sitting; they withdraw voluntarily, but enter a protest declaring their right to stay.

When it is said that a nobleman must be tried by his peers, it is understood at the suit of the King, upon an indictment of high treason, petit treason, felony, or misprision thereof: but in case of a præmunire, riot, or the like, and generally for all other crimes out of parliament (unless otherwise specially provided for by statute, as it is in many instances), though it be at the suit of the King, he shall not be tried by his peers, but by the freeholders of the county. 3 *Inst.* 30. 2 *Haw.* 424. Process of outlawry lies against a peer, if he be indicted, and appears not and cannot be taken. 3 *Inst.* 31.

3. The court of King's Bench is a court of criminal causes as well as civil ones, and takes cognizance of crimes from high treason down to a breach of the peace: there indictments from all inferior courts may be removed by writ of *certiorari*, and tried either at bar, or at *Nisi prius*, by a jury of the county, out of which the indictment is brought.

4. The high court of Admiralty, held before the judge of the Admiralty, who is the Lord High Admiral's deputy, has also a criminal jurisdiction, and takes cognizance of all crimes and offences committed either upon the sea, or on the coasts, out of the reach of any English county; and by 15 Ric. II. c. 3. of death and mayhem happening in great ships being and hovering in the main stream of great rivers, below the bridges of the same rivers, which are then a sort of ports or havens, such as are the ports of London and Gloucester, though they lie at a great distance from the sea. By 28 Hen. VIII. c. 15. it is enacted, that these offences shall be tried by commissioners, nominated by the lord chancellor; namely the admiral or his deputy, and three

or



or four more; (among whom two Common Law judges are constantly appointed, who in effect try all the prisoners) the indictment being first found by a grand jury of twelve men, and afterwards tried by another jury as at Common Law: and that the course of proceedings shall be according to the law of the land. Though the judges try the prisoner, the judge of the Admiralty always presides, as does the Lord Mayor of London, at the Sessions of *oyer* and *terminer* in that city.

These four courts may be held at any place in the kingdom, and this jurisdiction extends over crimes that arise in any part of it: but the jurisdiction of the following is limited.

5, 6. The courts of *oyer* and *terminer* and general gaol delivery are held before commissioners appointed by the King, among whom are usually two judges of the courts at Westminster, twice every year in every county throughout the kingdom, except the four northern ones, where they are held but once a year, and except in London and Middlesex, where they are held eight times. The commissions of assize and *Nisi prius*, by which the judges sit in the county (for they sit by five authorities) were explained in page 201. f. x. and the commission of the peace by which they also sit, we treated of at page 59. f. 3. I shall only add here, that all justices of the peace of any county, wherein the assizes are held, are liable to be fined, if they do not attend at such assize, in order to return recognizances, &c. and to assist the judges in such matters as lie within their knowledge and jurisdiction. The fourth commission by which they sit, is that of *oyer* and *terminer*, to hear and determine all treasons, felonies, and misdemeanors; so that by virtue of this commission they commonly proceed on indictments found at the assizes: they have therefore a fifth commission of gaol delivery, which empowers them to try and deliver every prisoner, who shall be in gaol when the judges arrive at the circuit town, whensoever and by whomsoever indicted, or for whatever crime committed: so that the gaols are cleared twice a year. Sometimes, upon urgent occasions, the King issues a special commission confined to offences that require immediate punishment, as was the commission to try the rioters in 1780 in Surry. These commissions are directed to the judges and several others, and any two of them: but the judges or serjeants at law, being only of the *Quorum*, the rest cannot act without one of these.



7. The court of general quarter-sessions of the peace must be held in every county once in every quarter of a year, which by 2 Hen. V. c. 4. is appointed to be in the first weeks after Michaelmas Day, Epiphany, the Translation of St. Thomas, and the 7th of July. It is held between two or more justices of the peace, of which one must be of the *Quorum*. Though this court seldom, if ever, tries any greater offences than small felonies within the benefit of clergy, its jurisdiction, by 34 Edw. III. c. 1. extends to trying and determining all felonies and trespasses whatever. Indeed the commission provides, that in case any difficulty arises, they shall not proceed to judgment, but in the presence of one of the justices of the courts of King's Bench or Common Pleas, or one of the judges of assize; and therefore capital felonies are usually remitted for a more solemn trial at the assizes. Neither can they try any new-created offence, without an express power given them by the statute which creates it; but there are some misdemeanors that are cognizable in this court by statute, such as offences relating to the game, highways, alehouses, bastard children, settlement and provision for the poor, vagrants, servants wages, apprentices, and popish recusants. Some of these are proceeded on by indictment, and some in a more summary way, by motion and order thereupon, which order, unless guarded by particular statutes, may by a writ of *certiorari* be removed into the court of King's Bench, and be there either quashed or confirmed. The *Custos rotulorum*, who is always a justice of the *Quorum* (and who is the principal *civil* officer in the county, as the Lord Lieutenant is the chief in military command) is nominated by the King's sign manual; and to him is committed the custody of the records or rolls of the sessions. He has the nomination of the clerk of the peace, and this office he is expressly forbidden to sell for money.

In most corporate towns there are quarter-sessions held before justices of their own, within their respective districts; with the same powers as the quarter-sessions of the county, except that appeals from their orders, respecting the removal of the poor, must be, by 8 & 9 W. III. c. 30. to the county sessions. In both counties and towns corporate, there is sometimes kept a special or petty sessions by a few justices for the convenience of the neighbourhood, between the times of the quarter-sessions, such as for licensing alehouses, passing parish accounts, and the like.

8. The



8. The Sheriff's Tourn or rotation is also a court of record held twice a year, within a month after Easter and Michaelmas, before the sheriff in different parts of the county: it being only the sheriff's tourn to keep a court-leet in each hundred. This therefore is the great court-leet of the county, as the county court is the court-baron.

9. The Court-leet is a court of record held once a year in a particular hundred, lordship, or manor, before the steward of the leet, for the ease of the sheriff. It is in fact the King's court granted by charter to the lords of those hundreds or manors. The design of its institution was to view the frank pledges, that is, the freemen within the liberty; it also has jurisdiction, like the sheriff's tourn, in breaches of the peace, and divers minute offences. All freeholders within the precinct are obliged to attend them; and all persons resident in that precinct, except such as are under twelve and above sixty years old, peers, clergymen, women, and the King's tenants in ancient mesne, are bound to appear upon the jury, if required, and make their due presentments. It was antiently the custom to summon here all the King's subjects, as they came of age, and there to take the oath of allegiance. The other business of this court, and the sheriff's tourn, was to prevent and punish all crimes happening within their precinct; as all trifling debts were recoverable in the court-baron and county court. But the 52 Hen. III. c. 10. having excused all peers and clergymen from their attendance on these courts, they are fallen into disrepute, and their business has gradually devolved upon the quarter-sessions.

10. The Coroner's Court is also a court of record, of which we have already treated. See page 58. f. 2.

11. The Court of the clerk of the market, is the most inferior court of criminal jurisdiction in the kingdom. It is incident to every fair and every market, to punish misdemeanors therein, as a court of *pie-poudre* is to determine all civil disputes. This court has cognizance chiefly of weights and measures, to try whether they are agreeable to the standard: if not, the party using them is liable to be fined, and the weights and measures burnt.

There are a few other criminal courts, which from their confined jurisdiction may be called private courts; but as they are now in disuse, it is needless to mention them.



## C H A P. V.

## OF CONVICTIONS WITHOUT TRIAL, CALLED SUMMARY.

THE mode of conviction in criminal courts is either *summary* or *regular*.

*Summary conviction* is unknown at Common Law, except in the case of contempts, but is directed by several acts of parliament for inflicting certain penalties created by those acts. Here there is no intervention of a jury, but the party accused is acquitted or convicted in a summary way, by the suffrage of such person or persons only as the act has appointed for his judge; an institution contrived to prevent the frequent and troublesome attendance of juries in very trifling causes. The process of these summary convictions is extremely short and speedy. The magistrate summonses the party accused to appear. If he does not appear, he proceeds to examine one or more witnesses, as the statute requires, upon oath, and then makes his conviction of the offender in writing; which done, he issues his warrant to apprehend him, if he is to be corporally punished; or levies the penalty incurred by distress and sale of his goods. If the offender appears to the summons, he is heard in his own defence, and may bring witnesses to support that defence.

Summary convictions are branched out into three: 1. Those before commissioners respecting offences against the laws of the excise and revenue; 2. Those before justices of the peace, for disorderly offences, such as swearing, drunkenness, vagrancy, idleness, and the like; and, 3. And the mode of punishing contempts by attachment. I shall have occasion only to dwell upon the last.

Such contempts as are thus punished are either those which openly insult or resist the powers of the courts or the person of the judges there presiding, or those which without any gross insolence or direct opposition, plainly tend to create disregard to their authority. The chief offences of either kind that are usually punished by attachment, are the following: 1. The unjust, oppressive, or irregular acting of inferior judges and magistrates in the execution of their offices. 2. Acts of oppression, extortion, collusive behaviour, or culpable neglect of duty, in sheriffs, bailiffs, gaolers,



gaolers, and other officers of the court. 3. Gross instances of fraud and corruption, injustice to clients, or other dishonest practices in attorneys and solicitors. 4. Non-attendance when summoned, refusing to be sworn or to give any verdict, eating and drinking without leave of the court, especially at the expence of the plaintiff or defendant, and the like, in jurymen. 5. Non-attendance when summoned, refusing to be sworn or examined, or prevaricating in their evidence when sworn, in witnesses. 6. Disobedience to any rule or order made in the proceedings of a cause; non-payment of costs awarded by the court, or non-observance of awards duly made by arbitrators or umpires, after having entered into a rule for submitting to such determination, in parties to any suit or proceeding. Obedience to any rule of court may, by 10 Geo. III. c. 50. be enforced against any member of parliament by distress infinite. 7. Forcible delivery or rescue of a defendant, and the like, or disobedience to the King's great prerogative writs, *viz.* prohibition, *Habeas corpus*, &c. in any person, even in a peer. And, 8. Speaking or writing contemptuously of the court or judges acting in their judicial capacity, by printing false accounts (or even true ones, without permission) of causes then depending in judgment. In short, any thing that demonstrates a gross want of respect to those courts, an awful regard to which in support of their authority, is so necessary for the good order of the kingdom.

The process of attachment is as follows: where the contempt is committed in the face of the court, the offender may, without any proof or examination, be instantly apprehended and imprisoned at the discretion of the judges: but in matters of which the court is not eye-witness, if the judges on *affidavit* see reason to suspect that a contempt has been committed, they either make a rule on the suspected person to shew cause why an attachment should not issue against him; or in very flagrant instances, the attachment is issued without such a rule; as it does, if sufficient cause be not shewn to discharge it. When the party is brought into court by this process; he must either stand committed or give bail to answer upon oath to such interrogatories as shall be put to him respecting the offence. These interrogatories are in the nature of a charge, and must be exhibited by the court within the first four days, and if any of the interrogatories should be improper, the defendant may refuse to answer them, and move the court to have them struck out. If the party can clear himself upon oath, he is dis-



charged; if not, he may be punished by fine or imprisonment, or both, and sometimes by a corporal or infamous punishment; and if he perjures himself in his answers, he may be prosecuted for the perjury. This method of obliging the defendant here to answer upon oath to a criminal charge, is not agreeable to Common Law in any other instance, but being of high antiquity, by long and immemorial usage, it is become the law of the Land.

## CHAP. VI.

### OF THE REGULAR METHOD OF PROCEEDING IN CRIMINAL COURTS.

HAVING described the courts of criminal jurisdiction, and explained the mode of *summary* conviction, we come now to that which is *regular*, the proceedings in which are twelve: 1. Arrest; 2. Commitment and bail; 3. Prosecution; 4. Process; 5. Arraignment, &c. 6. Plea; 7. Trial, &c. 8. Benefit of clergy; 9. Judgment; 10. Revival of judgment; 11. Reprieve or pardon; and, 12. Execution.

I. And first, as to *arrest*, or apprehending one's person, to which in criminal cases all persons, without distinction, are liable: but none may be apprehended, unless charged with such a crime, as will at least justify holding him to bail. Arrests are made in four ways: 1. By warrant; 2. By an officer without warrant; 3. By a private person also with a warrant; and, 4. By hue and cry. See page 239.

1. Warrants for criminal arrests may in extraordinary cases be issued out by the privy council, or the secretaries of state, but generally they are granted by justices of the peace, on the oath of the party requiring such warrant, setting forth, that he knows or suspects the guilt of the person he wishes to apprehend, of the sufficiency of which oath the magistrate is judge. This warrant should be under the seal of the justice, should set forth the time and place of granting, the cause for which it is granted, and should be directed to the constable, or other peace officer, (or it may be to any private person by name) requiring him to bring the party generally before *any* justice of the peace for the county, or only before the justice who granted it; in which last case  
the



the warrant is called a *special* warrant. A *general* warrant to apprehend all persons suspected, or guilty of any crime, without naming or describing any one, is illegal, and will not justify the officer who acts under it; but if properly proved (though the magistrate in granting such warrant should exceed his power) will, by 24 Geo. II. c. 44. indemnify the officer. When a warrant is received by the officer, he is bound to execute it, so far as the jurisdiction of the magistrate and himself extends. A King's Bench warrant issued by any of the justices of that court, extends over all the kingdom; but the warrant of a justice of the peace of one county, will not extend to another, unless backed by a magistrate of such other county. And by 13 Geo. III. c. 31. any warrant for apprehending an English offender who may have escaped to Scotland, and *vice versa*, may be endorsed and executed by the local magistrates, and the offender conveyed back to that part of the united kingdom, in which such offence was committed.

2. Arrest by officers without warrants. A justice may himself apprehend, or, by word only, cause to be apprehended any person committing felony or a breach of the peace in his presence. The sheriff and coroner also, without a warrant, may apprehend any felon within the county. A constable may also, without warrant, take up any person breaking the peace in his presence, and carry him before a justice, and in case of a felony committed, or such a wound given as may occasion felonious death, he may on probable suspicion apprehend the offender, and for that purpose is justifiable in breaking open doors (even without a warrant provided he has first asked for admittance. 2 *Haw.* 86.) Nay, he may kill the felon if he cannot otherwise be taken: and if he or either of his assistants be killed in such attempt, it is murder in all concerned. Watchmen, such as by 13 Edw. I. c. 4. keep watch in all towns from sun-setting to sun-rising, or such as are mere assistants to the constable, may, in virtue of their office, arrest all offenders, especially night-walkers, and commit them to custody till the morning.

3. Any private person present (more especially a peace-officer) is bound by law, when any felony is committed, to apprehend the offender, on pain of fine and imprisonment, if he escapes by the negligence of the standers-by: and to follow such offender they may break open any doors; they may even justify killing him, if he cannot be taken alive; and should any be killed in endeavouring to apprehend him, it is murder. A private person may also arrest a felon or other person



person on suspicion ; but he must not break open a door to do this ; and if either party kill the other in the attempt it is manslaughter. By 17 Geo. II. any private person may apprehend beggars and vagrants.

4. Hue and cry (from *huer*, to shout) is the old Common Law method of pursuing felons and such as have dangerously wounded another. The 13 Edw. I. c. 1, 3 & 4. direct that every county shall be so well kept, that immediately upon robberies and felonies committed, fresh suit shall be made from town to town, and from county to county ; and that hue and cry shall be raised upon the felons, and they that keep the town shall follow with hue and cry, with all the town and the towns near ; and so hue and cry shall be made from town to town, until they be taken and delivered to the sheriff ; and that such hue and cry may more effectually be made, the hundred is bound by the same statute to answer for all robberies therein committed, unless they take the felon. Hence the action against the hundred to recover loss by robbery. No hundred however shall be answerable for any robbery on a person *travelling* on the Lord's Day ; but the inhabitants shall make hue and cry notwithstanding, on pain of forfeiting to the King as much money as the party was robbed of. 29 Car. II. c. 7. But a hundred was charged with the loss of a person robbed on a Sunday going to church, that being a necessary duty. *Str.* 406. *Comyns* 345. Nor by 22 Geo. II. c. 24. shall any person recover against the hundred, more than the value of two hundred pounds, unless the person robbed, shall at the time of the robbery be together in company, and be in number two at the least, to attest the truth of his or their being so robbed. And by the yearly land-tax acts no receiver-general, or any of his agents employed for carrying of money on account of the said tax, shall maintain an action against the hundred, unless the persons carrying such money be together in company, and be in number three at the least. Also a robbery done in the night, shall not charge the hundred ; but yet if it be in the day-time, or so much light, as that to see a man's face, so as to know him, though it be before the sun-rising, or after the sun-setting, the hundred shall answer for it. *Dalt.* c. 84. But there are several notices to be given by the party robbed to make the hundred liable. 27 Eliz. c. 13. s. 11. 8 Geo. II. c. 16. s. 1, 2. By 27 Eliz. c. 13. no hue and cry is sufficient unless made with both horsemen and footmen. And by 8 Geo. II. c. 16. the constable or like officer, refusing or neglecting to make hue  
and



and cry, forfeits five pounds, and the whole vill or district is liable to be amerced, if any felony be committed therein and the felon escapes. Hue and cry may be raised either by precept of a justice of the peace, by a peace officer, or by any private person knowing of a felony. The party raising it must acquaint the constable of the vill with all the circumstances which he knows of the felony, and the person of the felon, on which the constable is to search his own town and raise all the neighbouring villages and make pursuit with horse and foot, and in the prosecution of such hue and cry, the constable and his attendants have the same powers, protection, and indemnification as if acting under the warrant of a justice of the peace. But if a man wantonly and maliciously raises a hue and cry, without cause, he shall be severely punished as a disturber of the public peace.

To encourage the apprehending of felons certain rewards and advantages are by statute bestowed on such as bring them to justice. By 4 & 5 W. & M. c. 8. such as apprehend a highwayman and prosecute to conviction, shall receive a reward of forty pounds from the public; to be paid to them (or, if killed in the endeavour to take him, their executors) by the sheriff of the county; besides the horse, furniture, arms, money, and other goods taken upon the person of such robber, with a reservation of the right of any person from whom the same may have been stolen: to which the 8 Geo. II. c. 16. superadds ten pounds to be paid by the hundred indemnified by such taking. By 6 & 7 W. III. c. 17. & 15 Geo. II. c. 28. such as apprehend and convict any offender against these statutes, respecting the coinage, shall (in case the offence be treason or felony) receive a reward of forty pounds; or ten pounds, if it only amount to counterfeiting the copper coin. By 10 & 11 W. III. c. 23. any person apprehending and prosecuting to conviction a felon guilty of burglary, house-breaking, horse-stealing, or private larceny to the value of five shillings from any shop, warehouse, coach-house, or stable, shall receive a certificate exempting him from all parish and ward offices; which certificate he may assign over, and the assignee shall have the benefit of it. And by 5 Ann. c. 31. any person so apprehending and prosecuting a burglar, or felonious housebreaker (or, if killed in the attempt, his executors) shall be entitled to a reward of forty pounds. By 6 Geo. I. c. 23. persons discovering, apprehending, and prosecuting to conviction any person taking reward for helping others to their stolen goods, shall be entitled to



to forty pounds. By 14 Geo. II. c. 6. explained by 15 Geo. II. c. 34. persons apprehending and prosecuting to conviction such as steal, or kill with an intent to steal, any sheep or other cattle, specified in the latter of the said acts, shall for every such conviction receive a reward of ten pounds: and by 16 Geo. II. c. 15. & 8 Geo. III. c. 18. persons discovering, apprehending, and convicting felons and others being found at large during the term for which they are ordered to be transported, shall receive a reward of twenty pounds.

II. The next part of criminal process is *commitment and bail*. When an offender is apprehended and brought before a justice of the peace, that justice is bound immediately to examine into the charge against him; acquit him, if innocent, and make him find bail or commit him to prison, if guilty; or if any suspicion lies against him. For this purpose, by 2 & 3 Ph. & M. c. 10. he is to take in writing the examination of such prisoner, and the information of those who bring him.

By the *Habeas corpus* act, to refuse bail to any person bailable is an offence in any magistrate, at the Common Law, against the liberty of the subject; and lest the intention of the law should be frustrated by magistrates requiring more bail than necessary, it is declared by 1 W. & M. st. 2. c. 1. that excessive bail ought not to be required; but if magistrates take insufficient bail, and the criminal doth not appear at the time he is bound by such bail to appear, they are liable to be fined. The person who is to take the bail may however examine them on their oaths concerning their sufficiency. 2 Haw. 89. 2 H. H. 125. Admitting bail also where it ought not is punishable by the judge of assize by fine, or punishable as a negligent escape at Common Law. H. P. 97. And by the 3 Edw. I. c. 15. if any officer bail any not bailable, he shall have three years imprisonment, and make fine at the King's pleasure. And by 21 Jac. I. c. 26. persons acknowledging or procuring to be acknowledged any bail in the name of any other not privy to the same, are guilty of felony without benefit of clergy; or by 4 W. III. c. 4. if any one shall personate another before those who have authority to take bail, so as to make him liable to the payment of any sum of money in that suit or action, he shall be guilty of felony (but within clergy). Bail may be taken in open court, or in some cases by the sheriff, coroner, or other magistrate. But let us see what offences are *not* bailable, we shall then learn what are. In this inquiry,



inquiry, we will take no notice of those cases where bail is denied by particular statutes to prisoners guilty of certain crimes, for in such cases imprisonment is part of their sentence. But where imprisonment is only designed for safe custody *before* conviction, bail is taken away, where the offence is of a very atrocious nature, and where no bail can be a security equivalent to the actual custody of the person. For what may not a man be induced to forfeit to save his own life? and what satisfaction is it to the public to seize the effects of those who bail a felon, if the felon be suffered to escape with impunity? No justice of peace then is allowed to take bail for a charge of treason, murder, or even manslaughter, if the prisoner be clearly the killer and not barely suspected; or if any indictment be found against him. Persons committed for felony and breaking out of prison cannot be bailed by justices: nor any of the following, *viz.* persons outlawed; such as have abjured the realm; approvers, of whom we shall speak hereafter; persons taken in the fact of felony; such as are charged with arson; and excommunicated persons. The following areailable or not at the discretion of the justices, thieves openly known; persons charged with other felonies, or manifest and enormous offences, not having a good character; and accessories to felony, that labour under a bad reputation. But the following *must* be bailed, if proper security be offered, *viz.* persons of good character charged with a bare suspicion of manslaughter, or other inferior homicide; or such persons charged with petit larciny or any such felony, not before-mentioned; or such persons accessory to felony. The court of King's Bench however (or any judge thereof, in time of vacation) may bail for any crime, according to the circumstance of the case, even for treason or murder; except such persons as are committed by either house of parliament during the sitting of the sessions, or such as are committed for contempts by any of the King's superior courts of justice. The law has allowed this one court only to take bail, lest allowing this liberty to magistrates in general should tend to elude the public justice. In short, where the offence is notailable, the prisoner is to be committed to gaol, for trial, by the *mittimus* of the justice, that is, a warrant under his hand and seal, specifying the cause of his commitment. But during this confinement, it being only for safe custody, the prisoner should be neither loaded with needless fetters, or subjected to any other hardship than the gaoler in his discretion shall think necessary, in order to keep him safely.



III. The next step to the conviction and punishment of offenders is their *prosecution*, of which there are four modes; *viz.* 1. Presentment; 2. Indictment; 3. Information; and, 4. Appeal. The first two are upon a previous finding of the fact by a grand jury; the other without such finding.

1. A presentment is the cognizance taken by the grand jury of any offence, from their own knowledge or observation; without any bill of indictment laid before them; such as the presentment of a nuisance, a libel, and the like; upon which the officer of the court frames an indictment, before the party can be called upon to answer it. There are also presentments which are inquiries of office, or the act of a jury summoned by the proper officer to inquire of matters relative to the crown from evidence laid before them, some of which are in themselves convictions. Of this kind are *felo de se*; flight of persons accused of felony; deodands, &c. There are also presentments of petty offences in the sheriff's tourn or court-leet, whereon the presiding officer may set a fine. There are other inquiries that are not in themselves convictions, but which may be afterwards inquired into; particularly that of the coroner on the death of a man; in which case the offender so presented, may dispute the truth of it.

2. Indictments are written accusations of one or more persons, of a crime or misdemeanor at the suit of the King, preferred to, and presented upon oath by, a grand jury. Grand juries consist of respectable freeholders (generally the men of most consequence in the county) summoned by the sheriff, every session of the peace, and every commission of *oyer and terminer* and of general gaol delivery; some out of every hundred. The number summoned is twenty-four, and as many of these as attend, not less than twelve, nor more than twenty-three, (that twelve may be a majority) are sworn to inquire for the body of the county, present and do and execute all those things which, on the part of our Lord the King, shall then and there be commanded them. This grand jury is previously instructed in the articles of its enquiry, by a charge from the judge who presides on the bench. They then withdraw and sit and receive indictments preferred to them in the name of the King, but at the suit of any private prosecutor. As the finding of an indictment, or allowing it to be valid, is only in the nature of an accusation to be afterwards tried; this jury is only to examine into the evidence in behalf of the prosecution: that is, they are



are to enquire upon their oaths, whether there be sufficient cause to call upon the party accused to answer the accusation or not.

A grand jury cannot take cognizance of any thing done out of that county for which they are sworn, unless particularly empowered by act of parliament. But by 2 & 3 Edw. VI. c. 24. where a man is wounded in one county and dies in another, the party wounding is indictable in the county where the man died: and by 2 Geo. II. c. 21. if the stroke or poisoning be in England, and the death upon the sea, or out of England, or *vice versa*; the offenders and their accessories may be indicted in the county, where either the death, poisoning, or stroke shall happen. By several statutes of Hen. VIII. where treason is committed out of the realm, it may be inquired of in any county within the realm, as the King shall direct. By 26 Hen. VIII. c. 6. & 34 & 55 Hen. VIII. c. 26. f. 75, 76. counterfeiters, washers, or minishers of the current coin, together with all manner of felons and their accessories, may be indicted and tried for these offences, if committed in any part of Wales, either in Herefordshire or Shropshire. Murders also any where committed, abroad or at home, may, by 33 Hen. VIII. c. 23. be inquired of and tried by the King's special commission in any place in the kingdom. By 10 & 11 W. III. c. 25. all capital crimes committed in Newfoundland may be enquired of and tried in any county in England. By 9 Geo. I. c. 22. offences against this act, called the Black Act, may be indicted and tried in any county in England, at the option of the prosecutor. By 8 Geo. II. c. 20. and 13 Geo. III. c. 84. feloniously destroying turnpikes or works upon navigable rivers erected by authority of parliament, may be indicted and tried in any adjacent county. By 26 Geo. II. c. 19. plundering or stealing from any vessel in distress or wrecked, or breaking any ship contrary to 12 Ann. st. 2. c. 18. such as making any hole in her, stealing her pumps, &c. may be prosecuted either in the county where the fact was committed, or in the county next adjoining; and if committed in Wales, in the county of Hereford or Salop. By 12 Geo. III. c. 24. felonies committed abroad in burning or destroying the King's ships, magazines, or stores, may be indicted or tried in any county of England, or in the place where the crime was committed. By 13 Geo. III. c. 63. misdemeanors committed in India may be tried upon information or indictment in the court of King's Bench in England, and witnesses may be examined abroad by commission.



mission. But in general all offences must be indicted and tried in the county where the fact was committed. Yet where larciny is committed in one county, and the goods carried into another, the offender may be indicted in either: so may he in England for larciny in Scotland, when the goods are carried into England, or *vice versa*, or for receiving in England goods stolen in Scotland, and *vice versa*: but for robbery, burglary, and the like, he can only be indicted where the fact was committed; for though the carrying away and keeping of the goods stolen is a continuation of the larciny, it is not so of a robbery or burglary. And if a person be indicted in one county for larciny, for goods originally taken in another, and be convicted of the same, or stands mute, that is, will not plead to the indictment, he shall not have the benefit of clergy, provided the original taking be attended with such circumstances as would have deprived him of clergy by any statute made before 1691.

If the grand jury, on hearing the evidence in behalf of the prosecution, think it a groundless charge, they write on the back of the bill, "not found," or "not a true bill," and the party is immediately discharged. But a fresh bill may afterwards be preferred to a subsequent grand jury. If the jury are satisfied with the truth of the charge, they endorse upon it, "a true bill." The indictment is then said to be found, is publicly delivered into court, and the party stands for trial. Note. To find a bill, twelve of the jury must assent.

By 1 Hen. V. c. 5. all indictments must set forth the Christian name, surname, and addition of the state and degree, mystery, town, or place, and the county of the offender, in order to identify his person; and if father and son have the same name and addition, the son must be called the *younger*. 2 *Haw.* 187. But if the defendant appeareth upon process, taking no advantage thereof by exception, he loseth the benefit of this irregularity. 2 *Haw.* 190. The place where and the time also when the fact was committed must be specified, as by 7 W. III. c. 3. No prosecution shall be had for any of the treasons or misprisions therein mentioned (except on assassination designed or attempted on the person of the King) unless the bill of indictment be found within three years after the offence committed; and in case of murder, the time of the death must be laid within a year and a day after the mortal stroke given. The offence also must be set forth with clearness and certainty, and certain technical words expressive of the offence.



offence must also be inserted in the indictments for particular crimes, as *treasonably, murdered, feloniously, burglariously, ravished, &c.* according to the nature of them, without which the indictment is void; and in murders, the length and depth of the wound must be set forth; and all this for the satisfaction of the court: and in some indictments, where the weapon that occasions death is forfeited to the King, the value of such weapon must be also expressed.

3. Informations which are a species of prosecution at the suit of the King, without any presentment, or previous finding of the bill by a grand jury, are of two sorts: that partly at the suit of the King, and partly at the suit of a subject; and that wholly in the name of the King. The former is usually brought upon penal statutes, which inflict a penalty on conviction of the offenders; one part to the use of the King, the other to that of the informer. On which I shall only observe, that by 31 Eliz. c. 5. no prosecutions upon any penal statute, the suit and benefit whereof are limited in part to the King, and in part to the prosecutor, can be brought by any common informer after one year is expired since the commission of the offence; nor on behalf of the crown after a lapse of two years longer; nor, where the forfeiture is originally given to the King, can such prosecution be tried, after the expiration of two years from the commission of the offence.

Informations in the name of the King only, are of two sorts; those properly his own suits, filed *ex officio* by the attorney-general, and those in which the King is nominal prosecutor, which last are, at the relation of some private person or common informer, filed by the master of the Crown Office, who is the standing officer for the public. Prosecutions that are filed by the attorney-general in virtue of his office, are for such enormous misdemeanors as tend to disturb the King's government, or affront him in the regular discharge of his duty; those filed by the master of the Crown Office on complaint of a subject, are any gross misdemeanors, riots, batteries, libels, and other flagrant immoralities. Informations thus filed must be tried by a petit jury of the county, where the offence arises, and if the offender be found guilty, the court of King's Bench must be resorted to to punish him. But it must be observed that these informations are confined to mere misdemeanors only. And to prevent vexatious informations brought by malicious prosecutors, it is enacted, by 4 & 5 W. & M. c. 18. That the clerk



clerk of the crown shall not file any information without express direction from the court of King's Bench; and that every prosecutor, permitted to promote such information, shall give security by a recognizance of twenty pounds to prosecute the same with effect, and to pay costs to the defendant, in case he be acquitted thereon, unless the judge who tries the information, shall certify there was reasonable cause for filing it; and at all events to pay costs, unless the information shall be tried within a year after issue joined: but informations filed by the attorney-general are not liable to the restraints of this act.

An information, at the Common Law, will lie for a great variety of crimes less than capital, as batteries, cheats, perjuries, riots, extortions, nuisances, contempts, and such like; and it will lie also in very many cases by statute, wherein the offender is liable to a fine or other penalty. *Finch*, 340. 2 *Haw.* 260. but if two informations be exhibited on the same day for the same offence, they naturally abate one another. 2 *Haw.* 275.

There is still farther one species of information, regulated by 9 Ann. c. 20. Those in the nature of a writ of *quo warranto*, explained at page 236. §. 5. which answers the same purpose with that writ, being a criminal prosecution filed by the attorney-general, with leave of the court, in order to fine any person who shall usurp an office or franchise, not granted by the crown; and to turn him out.

4. An appeal is a mode of prosecution still in force, but in little use from the great nicety required in conducting it: it implies an accusation by one private person against another for some felony or mayhem, demanding punishment of the offender for the injury committed. An appeal of felony may be brought for larciny, rape, and arson committed against one's self, or for murder or manslaughter committed against a relation, but such relation must be a husband, and the appeal brought by the wife for his death; or an ancestor, and the appeal for his death brought by the heir male, and confined to the four nearest degrees of blood. Such power of appeal being given to the wife for the loss of her husband, if she marries again, before or pending her appeal, it is lost, or if she marries after judgment, she cannot demand execution. The heir that brings an appeal must be the next heir by the course of Common Law, at the time his ancestor was killed, and such appeal is subject to three rules. 1. If the ancestor killed leaves an innocent wife, she only shall have the power of appeal, and not



not the heir. 2. If there be no wife, and the heir be accused of the murder, the person, who next to him would have been heir male, shall bring the appeal. 3. If the wife kills her husband, the heir may bring the appeal: and by 6 Edw. I. c. 9. all appeals of death must be sued within a year and a day after the death of the party. An idiot cannot bring an appeal. 1 *Haw.* 162.

These appeals may be brought, previous to an indictment, and if the defendant be acquitted, he cannot afterwards be indicted for the same offence. By Westm. 2. 13 Edw. I. c. 12. if the defendant be acquitted, the person appealing shall suffer one year's imprisonment, and pay a fine to the King, besides restitution of damages to the party for the imprisonment and infamy which he has sustained: and if the appellor be incapable to make restitution, his abettors shall do it for him, and also be liable to imprisonment. But this, is if the appeal shall appear to the court to have been malicious. 2 *Haw.* 198. This discouragement has occasioned the disuse of appeals.

If the appellee or defendant be found guilty, he shall suffer the same judgment as if he had been convicted on indictment; with this difference, that an indictment being at the suit of the King, he may either pardon or remit the execution, but on an appeal, which is at the suit of a private subject, for an atonement of the injury, the King can no more pardon it than he can remit the damages recovered on an action of assault. The punishment however of the criminal may be remitted and discharged by the concurrence of all parties interested; and as the King by his pardon may frustrate an indictment, so may an appellant by his release discharge an appeal.

IV. Indictment however being the general *mode of process*, I shall confine my observations to this, pointing out any variation that may arise from the method of prosecuting by either information or appeal.

After the indictment found, the offender, supposed to be in custody before such finding of the indictment, is to be immediately arraigned, that is, put upon his trial; but if, in capital cases, he hath escaped or secretes himself, or, in smaller offences having been bound over, doth not appear at the assizes or sessions (as an indictment may be found against him in his absence) process must issue to bring him into court, for the indictment cannot be tried unless he personally attends.

If upon a writ issued, summoning his attendance, he does not appear, a warrant is made out to apprehend him, commanding the sheriff

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to bring him up at the next assizes. If he absconds, he may, if it is thought proper, be outlawed; the nature of which outlawry is shewn at page 237, and is the same here as in civil actions. But an outlawry in treason or felony amounts to a conviction and attainder of the offence charged in the indictment, as much as if the offender had been found guilty. His life however is still under the protection of the law, and no man is justifiable in slaying him, unless it happens in endeavouring to apprehend him, for any person may take up an outlaw in a criminal prosecution at any time, and the justices of gaol delivery may award execution of him; but where clergy is allowable, an outlaw shall have it. 2 *Haw.* 243. But such outlawry may be reversed by a writ of error, and the proceedings therein are so exceedingly nice (as indeed they should be) that if any one single minute point be omitted or misconducted, the whole outlawry may be set aside, on which the party accused is admitted to plead to and defend himself against the indictment.

In this stage of the prosecution it is, that the process is sometimes removed into the court of King's Bench, by a writ of *certiorari*, for particular reasons in law, as to plead a pardon there; or on a surmise that the trial will be partially conducted in the courts below; to issue a process of outlawry, &c. where the prisoner may be tried before the justices of *Nisi prius*: and a *certiorari* may be granted at the instance of either prosecutor or defendant; the former as a matter of right, the latter as a matter of discretion, of course, in the last case, it is seldom done. At this stage also it is that indictments found by the grand jury against a peer, must be removed by writ of *certiorari* into the court of Parliament, or into that of the Lord High Steward of England; and also, that in courts of exclusive jurisdiction established by charter, as those of the two universities, indictments must be delivered, to be there tried and determined.

V. The offender being brought into court, he is to be immediately *arraigned*: which is calling him to the bar to answer the charge against him. He is to be called there by name, and brought without irons or any shackles, unless there is danger of his escaping. When at the bar, he is called upon by name to hold up his hand, by which he owns himself to be the person so called. The indictment then is read to him in English, after which he is asked, whether he is guilty or not guilty of the crime whereof he stands indicted. Where there is an accessory to the crime he cannot be tried so long as the principal remains



mains liable to be tried hereafter; but, by 1 Ann. c. 9. if the principal be once convicted, and before attainder (that is, before he receives judgment of death or outlawry) he is delivered by pardon, the benefit of clergy or otherwise; or if the principal stands mute, or challenges peremptorily above the legal number of jurors, so as never to be convicted at all; in any of these cases in which no subsequent trial can be had of the principal, the accessory may be proceeded against, as if the principal felon had been attainted. And upon the trial of the accessory, as well after as before the conviction of the principal, the accessory is at liberty (if he can) to controvert the guilt of his supposed principal, and to prove him innocent of the charge, as well in point of fact as in law. But if the principal be erroneously attainted, yet the accessory shall be put to answer, and shall not take advantage of the errors in that attainder: the principal reversing the attainder, however, reverses the attainder of the accessory. 1 H. H. 625.

Should a criminal, on being arraigned, confess the fact, the court hath nothing to do but to award judgment, but it is very tender on this head, and generally advises the prisoner to retract his confession, and plead to the indictment. If a criminal arraigned for treason or felony without benefit of clergy, confesses the fact, and accuses others his accomplices of the same crimes, he is called an approver, or prover from *probator*, and if the person so accused, is convicted upon his trial, such approver shall be pardoned; if not, he shall receive judgment to be hanged on his own confession of the indictment. But it is in the discretion of the court to permit this approvement or not, and it has been long in disuse on account of the many false and malicious accusations of desperate villains, rather than any good to the public rising by any discovery; especially, as all the good to be expected from approvement is fully provided for by other statutes in the cases of coining, robbery, burglary, house-breaking, horse-stealing, and larceny to the value of five shillings from ships, warehouses, stables, and coach-houses, which enact, that if such offender, being out of prison, shall discover two or more persons, who have committed the like offences, so as they may be convicted thereof, he shall, in cases of burglary or house-breaking, receive a reward of forty pounds, and in general be entitled to a pardon of all capital offences, excepting only murder and treason, and of them also in the case of coining; (but the pardon against the coinage act of 15 Geo. II. c. 8. extends only to all *such* offences).



fences). And if any such person, having feloniously stolen any lead, iron, or other metals, shall discover and convict two offenders of having illegally bought or received the same, he shall, by 29 Geo. II. c. 30. be pardoned for all *such* felonies committed before such discovery. It has also been customary for the justices of the peace, before whom any persons are brought for felony, to admit some one of their accomplices, to become a witness (called King's evidence) against his fellows, upon an assurance which the judges of gaol delivery have generally countenanced, that if such accomplice makes a full and complete discovery of that and all other felonies to which he is examined by such justice, and afterwards gives his evidence without prevarication or deceit, he shall not himself be prosecuted for that or any other previous offence of the same degree.

If a criminal stands mute, and will not plead to the indictment, it amounts to a confession of the crime. If he is really dumb, the judges of the court (who are to be counsel for the prisoner, and to see that he hath law and justice) may proceed to trial, as if he had pleaded not guilty; but it is doubted whether sentence of death can be passed on such a person, he not being able to say any thing in arrest of judgment. A prisoner's making no answer at all, when arraigned; answering foreign to the purpose; or having answered not guilty, refusing to put himself upon his country, is construed as standing mute, and it has been held to be so, when a prisoner has cut out his own tongue. Till very lately a person standing mute was ordered to the press-yard, there to be tied on his back naked, and pressed with heavy weights of iron, gradually heavier and heavier, till he either promised to plead or died; but now to the honour of our laws, by 12 Geo. III. c. 20. it is enacted that every person who, being arraigned for felony or piracy, shall stand mute, or not answer directly to the offence, shall be convicted of the same; and the same judgment and execution (with all their consequences) shall be thereupon awarded, as if the person had been convicted by verdict or confession of the crime; and as it hath been long clearly settled that standing mute in petit larciny and misdemeanors, hath always been equivalent to conviction, it now in all cases amounts to constructive confession.

VI. Upon the pleading of the prisoner, let us next see what plea he can make, or what matter he can alledge in his defence. Now there are five species of pleas which the law hath thus denominated.



1. A plea to the jurisdiction; 2. A demurrer; 3. A plea in abatement; 4. A special plea in bar; or, 5. The general issue of not guilty. Formerly the benefit of clergy used to be pleaded before trial; but as this is very disadvantageous, every felon having a chance on trial to be acquitted; and as, if convicted of an offence where the benefit of clergy is allowed, the convict may pray it before judgment is passed upon him; it is now very rarely pleaded before conviction.

1. A plea to the jurisdiction is where an indictment is brought before a court that has no jurisdiction over, or authority to try the offence, as, for example, treason at the quarter-sessions, and the like, in which cases he may except to the authority of the court, and refuse to answer at all.

2. A demurrer to the indictment, is incident to civil cases as well as criminal ones, and is where the prisoner does not deny the charge, but insists that the fact as stated is no felony, treason, or whatever the crime is alledged to be: and even when in demurrer the point of law is adjudged against the prisoner, no advantage is taken of his confessing the fact, but he is notwithstanding allowed to plead not guilty.

3. A plea in abatement, is principally for a wrong name or a false addition given to the prisoner in the indictment, which if found by a jury, the indictment shall be null: but this is of little advantage to the prisoner, as a new indictment may be framed according to what the prisoner avers his true name or addition to be, which he is obliged to set forth.

4. A special plea in bar, is a much more substantial plea. This goes to the merits of the indictment, and gives a reason why the prisoner ought not to be tried for the offence alledged. These are of four kinds; a former acquittal, a former conviction, a former attainder, or a pardon.

A *former acquittal* is grounded upon that universal maxim of the Common Law, that no man is to be brought into jeopardy of life more than once for the same offence. Of course a person once fairly acquitted upon any prosecution before a court competent to try the offence may plead such acquittal as a bar to any fresh indictment for the same identical crime. An acquittal therefore on an appeal is a good bar to an indictment for the same offence; so was at Common Law an acquittal on an indictment a sufficient bar to an appeal; but the 3 Hen. VII. c. 1. enacts that indictments shall be proceeded on immediately,



diately, at the King's suit, for the death of a man, without waiting for bringing an appeal (which may be brought only within a year and a day of the murder committed, but, if not brought in that time, it often happened that the witnesses died, or the whole was forgotten) and that the plea of former acquittal on an indictment, shall be no bar to the prosecuting of any appeal.

A *former conviction* for the same identical crime, though no judgment was given, being suspended by the benefit of clergy or other causes, is a good plea in bar of an indictment. And it is held that a conviction of manslaughter, on an appeal or an indictment for murder, is a bar even in another appeal, and much more in an indictment for the same crime. But,

A *former attainder* is a good plea in bar for the same or any other felony; for a prisoner by attainder being dead in law, his blood being already corrupted, and all his property forfeited, it would be absurd to endeavour to attain him a second time; unless the former attainder had been reversed for error, by act of parliament, or pardon. But where the attainder was upon indictment, such attainder is no bar to an appeal, as the King may pardon any sentence upon indictment. An attainder for felony is no bar to an indictment for treason, the forfeiture and manner of death for the two crimes being different; nor is it any bar, where a man is principal in a felony to which there are accessories to be tried, as such accessories cannot be tried till the principal is convicted. In short, a former attainder is not sufficient to bar an indictment, but in cases where a second trial would be superfluous.

But a *pardon* is always a good plea in bar. Pardon pleaded before trial, or *before* sentence is past, is much more advantageous than pleading it *after* sentence: as it prevents that corruption of blood which the sentence inflicts; for such corruption cannot be restored but by act of parliament: but of pardons we shall say more hereafter.

Let me observe however here, with respect to pleas in bar, that though in civil actions, a man, if he fails in one plea, cannot make use of another, of course it behoves him to study well his first plea; yet in capital prosecutions, as well upon appeal as indictment, if the prisoner's first plea fails, he may plead the general issue, not guilty. On which plea of



5. General issue, the criminal can only be condemned. Here he is allowed to make the best defence he can, either by justifying the fact, or controverting the evidence against him. On pleading not guilty, he is asked how he will be tried, to which he is to answer, if a commoner, "by God and the country;" that is, his jury; if a peer, "by God and my peers;" and should he refuse to make this answer, he is deemed to stand mute, and of course is convicted of the crime for which he is indicted.

VII. Of trial there were formerly several species, *viz.* 1. Fire ordeal, which was taking up in the hand a red hot piece of iron of two or three pounds weight, or walking barefooted and blindfold over nine red hot plough-shares laid lengthwise at different distances, a trial confined to persons of high rank; 2. Water ordeal, performed by plunging the bare arm up to the elbow in boiling water, or by casting the suspected person into a river or pond (sinking in which was an acquittal, floating or swimming a mark of guilt) a trial confined to the lower rank of people; both fire and water ordeal might be performed by deputy, but the principal was to abide the success. 3. The corned or morsel of execration, being a piece of cheese or bread, weighing about an ounce, and first consecrated with a form of exorcism, then given to the person suspected, who was to pray the Almighty, that it might destroy him if he was guilty; and, 4. The trial by single combat, which may be demanded at the option of the appellee in either an appeal or approvement: nor can the appellant or approver, unless a peer, a woman, a priest, minor, or a man aged sixty, or lame or blind, refuse such a challenge or combat; but is obliged to fight the appellee with batons or staves of an ell long. If the appellee be so far vanquished as he cannot or will not fight any longer, he shall be immediately hanged; but if he kills the appellant, makes him yield, or maintains the fight from sun-rising till the stars appear at night, he is acquitted, and shall recover damages of the appellant, and the appellant shall become informant. These four modes of trial took their rise in the superstition of our ancestors, who held that God on such trials would perform a miracle in favour of the truth; of course, if the person undergoing such trial escaped unhurt, he was deemed innocent; if not, he was concluded to be guilty. The first three modes, that of fire ordeal, water ordeal, and the corned have been long abolished, but the last trial, of battle, is still in force. It may also be demanded  
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in the civil case of a writ of right. When the tenant in a writ of right pleads that he hath more right to hold than the demandant hath to recover, he may offer to prove it by battle, and the plaintiff is obliged to acquiesce: only here the parties may fight by deputy or champion, that no person may claim an exemption, which in criminal cases they cannot. These champions are to fight bareheaded, bare-armed, and bare-legged, as before described, in a piece of ground sixty feet square before the judges of the court: the consequence of which combat is, loss of lands and infamy to the vanquished.

The trial of peers in the court of Parliament, or the court of the Lord High Steward has been mentioned already, page 340. f. 1, 2. it remains only to observe, that it differs little from trial by jury, except that the peers need not all agree in their verdict; and no special verdict can be given, the lords of Parliament or the Lord High Steward (if trial be in his court) being judges sufficiently competent of the law in these cases: but the majority, consisting in the least of twelve, will bind the rest.

But the trial by jury is the grand bulkwark of an Englishman's liberties secured to him by *Magna Charta*. By which it is enacted, That no free man shall be taken, imprisoned, banished, or in any other way destroyed but by the legal judgment of his peers, or by the law of the land. In civil causes this mode of trial has been largely explained. (See Book III. c. 5.) of course it will shorten our remarks here.

When a prisoner hath pleaded not guilty, and put himself for trial upon his country, that is, his jury: the court, by the clerk says, "God send thee a good deliverance."

Forty-eight jurymen are here summoned and returned by the sheriff from the neighbouring freeholders in the county where the fact was committed. These are to try all felons that may be called on their trial at that session. In cases of high treason, whereby corruption of blood may ensue (except treason in counterfeiting the King's coin or seals) or misprision of such treason, it is enacted by 7 W. III. c. 3. That the prisoner shall have a copy of the indictment five days before the trial (this is held to be, before the arraignment) and a copy of the panel of jurors two days before his trial; and he shall have the same compulsive process to bring in his witnesses *for* him, as was usual to compel their appearance *against* him. And by 7 Ann. c. 21. all persons indicted for high treason, or misprision thereof, shall have a list of all  
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the witnesses to be produced, and of the jurors impanelled, with their professions and places of abode, delivered to him ten days before the trial, and in the presence of two witnesses; the better to enable him to make his challenges and his defence, except in treasons respecting the King's coin and seals. 6 Geo. III. c. 53.

The trial being called, the jurors are to be sworn as they appear, to the number of twelve, unless challenged by the prisoner or on the part of the King; and here, as in civil cases, challenges may be made to the whole array, or to the separate polls, and for the same reasons. Also, where an alien is indicted, the jury should be half foreigners, if so many can be found in the place (except in trials for treason, aliens being improper judges of allegiance, and in trials of Gipsies or Egyptians by 22 Hen. VIII. c. 10.). In capital cases the prisoner is allowed an arbitrary or capricious challenge called *Peremptory*, to thirty-five jurymen, without shewing any cause at all, that he may not be disconcerted by not having a good opinion of his jury: but this peremptory challenging is denied to the King by 33 Edw. I. st. 4. which enacts that the King shall challenge no jurors without assigning a cause certain, to be tried and approved by the court. But the King's counsel need not assign the cause of challenge, till all the panel is gone through, unless there cannot be a full jury without the persons so challenged. If a prisoner challenges more than thirty-five peremptorily, and will not retract his challenge, he is deemed to stand mute, and his conviction of course follows. In trials for felony, a prisoner, by 22 Hen. VIII. c. 14. is not allowed more than twenty peremptory challenges, if he challenges more, such challenge is set aside, and such juror is sworn. If, on account of these challenges, or a want of a sufficient number of jurymen, the number twelve cannot be had, a *tales* may be awarded as in civil causes (which see) except in mere commissions of gaol delivery; but the court may order a new panel to be instantly returned. The twelve jurymen are separately sworn "well and truly to try and true deliverance make  
" between our sovereign Lord the King, and the prisoner at the bar,  
" and a true verdict give, according to their evidence."

The jury being sworn, if it be a cause of any consequence, the King's counsel usually open the indictment, examine the witnesses, and enforce the prosecution by argument. But the prisoner in any capital crime is allowed no counsel on his trial, the judge being appointed.



pointed to be his counsel; and because the evidence to convict a prisoner, should be so manifest as not to be contradicted. Counsel is however allowed him, where a point of law shall arise, and be thought proper to be debated. The judges indulge him likewise so far, as to suffer counsel to examine the evidence even in matters of fact; but persons indicted for such high treason as works a corruption of blood, or misprision thereof (except treason in counterfeiting the King's coin or seals) may, by 7 W. III. c. 3. make their full defence by counsel, not exceeding two, to be named by the prisoner, and assigned by the court or judge, and the same indulgence is allowed to parliamentary impeachments for high treason, by 20 Geo. II. c. 30.

The doctrine of evidence in criminal causes is much the same as that in civil ones: the only distinction arises from several acts in a few leading points. In all cases of high treason, petit treason, and misprision of treason, by 1 Edw. VI. c. 12. and 5 & 6 Edw. VI. c. 11. *two* lawful witnesses are required to convict a prisoner, unless he shall willingly or without violence confess the same; and except in treasons for counterfeiting the King's coin, seals, and signatures, or for importing counterfeit foreign money current in this kingdom, and impairing, counterfeiting, or injuring any current coin. 1 & 2 P. & M. c. 10, 11. By 7 W. III. c. 3. in those treasons to which this act extends, *two* witnesses are also required; and if the prisoner confesses the fact, such confession must be in *open court*: but it is held on these words, that a confession, when out of court, before a magistrate or person authorized to take it, and proved by two witnesses, is sufficient: by the same statute, both witnesses must be to the same overt act of treason, or one to one overt act and the other to another overt act of the same species of treason, and not of distinct heads or kinds; and no evidence shall be admitted to prove any overt act not expressly laid in the indictment. But in almost every accusation one positive witness is sufficient. One witness is not allowed to convict a man indeed for perjury, because there is then only one oath against another; and in treason, two witnesses are required, that a man may not fall a sacrifice to fictitious conspiracies; but, as in other crimes, the very privacy of their nature often excludes the possibility of having more witnesses than one, it would be wrong to let such escape unpunished.

Mere similitude of hand-writing in two papers shewn to a jury is no evidence that both were written by the same person, but evidence  
well



well acquainted with the party's hand, that the paper in question is believed to have been written by him, the jury is to judge of.

By 21 Jac. I. c. 27. the mother of a bastard child, concealing its death, must prove by one witness that the child was born dead, or such concealment shall be evidence of her having murdered it. See page 318.

The law holding it better that ten guilty persons should escape rather than that one innocent man should suffer, all presumptive evidence is very cautiously admitted, and the following rules are usually observed. 1. Never to convict a man for stealing the property of a person unknown, merely because he will not account how he came by it, unless an actual felony be proved of such property; and, 2. Never to convict a person of murder or manslaughter, unless the dead body be found. Formerly witnesses for the prisoner, in capital cases, were not allowed to be examined at all, or at least, not to be examined upon oath, but now, by 1 Ann. st. 2. c. 9. in all cases of treason and felony, all witnesses *for* the prisoner are admitted to be examined upon oath, in like manner as the witnesses *against* him.

When the evidence against and for the prisoner is gone through, and he has said what he thought proper in his defence, the jury are to consider of it, as in civil causes, and deliver in their verdict: neither can they be discharged till they have. Here indeed, in a criminal case, no jury can give a privy verdict, it must be open; and also general, either guilty or not guilty, or special, setting forth all the circumstances of the case, and praying the judgment of the court on the facts stated: this is where they doubt the matter of law, though, if they think proper to hazard a breach of their oaths, they have a right to determine the matter themselves, and if their verdict be notoriously wrong they may be punished, and their verdict set aside by attain at the suit of the King, but not at the suit of the prisoner. In many instances where, contrary to evidence, the jury have found the prisoner guilty, their verdict hath been mercifully set aside, and a new trial granted by the court of King's Bench: but there never was an instance of a new trial's being granted where the prisoner was *acquitted* on the first.

Should the jury find the prisoner not guilty, he is for ever discharged of the accusation (but the Civil Law discharges him only from the same accuser, not from the same accusation) except he be appealed of

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felony,



felony, within a year and a day of the completion of the felony's being committed, and upon such discharge, or for want of prosecution, he shall, by 14 Geo. III. c. 20. be immediately set at liberty, without payment of any fee to the gaoler. If the prisoner be found guilty, he is said to be convicted; he may also be convicted on his own confession, or by standing mute, as hath before been shewn.

On conviction in general for any felony, the prosecutor is allowed, by 25 Geo. II. c. 36. the reasonable expences of the prosecution out of the county stock, if he petitions the judge for that purpose: and by 27 Geo. II. c. 3. poor persons bound over to give evidence (except in Middlesex) are entitled to be paid their charges, as well without conviction as with it. By 21 Hen. VIII. c. 11. on a conviction of larciny, the prosecutor, as a reward for the prosecution, shall have his goods restored to him, or the value of them, out of the offender's goods, if he has any, by a writ to be granted by the justices; and though such goods may have been sold in open market (see page 167.) the buyer is obliged to give them up, even to his own loss. And it is now usual for the court, upon the conviction of the felon, to order (without any writ) immediate restitution to the prosecutors of such goods as are brought into court; or else the prosecutor, without such writ of restitution, may peaceably retake his goods wherever he can find them, unless they have been fairly purchased. Or, if the felon be convicted, and escape with life, either through benefit of clergy or pardon, the party robbed may bring his action of trover against him for his goods, and recover a satisfaction with damages. But he cannot bring such action before prosecution, lest it should encourage compounding of felony; nor can the party retake them, if it be done with a design to smother or compound the larciny. Such composition being a heinous offence, as shewn in page 291.

Persons convicted of a misdemeanor, as of a battery, imprisonment, or any other offence immediately affecting an individual, are sometimes permitted by the court to talk with the prosecutor before judgment is passed, to try if they can make the matter up, and if the prosecutor declares himself satisfied, the punishment inflicted is but trivial; this, though a dangerous practice, is done to reimburse the prosecutor his expences, and make him some private compensation without the trouble of a civil action.

After



After conviction, judgment, that is sentence, follows, unless stayed or arrested by benefit of clergy, or some other intervening circumstance.

VIII. Benefit of clergy had its rise in the pious reverence of Christian princes for the church in its infant state, being an institution to exempt the clergy from criminal process before a secular judge. Popish ecclesiastics soon made an ill use of this, for they afterwards claimed this exemption not only for themselves, but for all lay attendants upon the church; and in length of time it grew to the exemption of all who could read, reading being a great mark of learning in those days of ignorance, till the 4 Hen. VII. c. 13. made a distinction between lay scholars and clerks in orders, subjecting the former to be burnt with a hot iron in the left thumb, and denying them this privilege a second time. By 1 Edw. VI. c. 12. Lords of parliament and peers of the realm, having place and voice in parliament, may have the benefit of their peerage, equivalent to that of clergy, for the first offence (although they cannot read, and without being burnt in the hand) for all offences clergyable to commoners; and also from the crimes of house-breaking, highway-robbery, horse-stealing, and robbing of churches. But it being afterwards considered that the punishment of death was too severe for simple felony, the 21 Jac. I. c. 6. allowed that women convicted of simple larcinies under the value of ten shillings should (not properly have the benefit of clergy, for they were not called upon to read) be burned in the hand, and whipped, stocked, or imprisoned for any time not exceeding a year; and a similar indulgence was, by 3 & 4 W. & M. c. 9. and 4 & 5 W. & M. c. 24. extended to women guilty of any clergyable felony whatsoever, allowing them once to claim the benefit of the statute, in like manner as men might claim the benefit of clergy, and to be discharged upon being burned in the hand, and imprisoned for any time not exceeding a year. And it was enacted by 5 Ann. c. 6. that the benefit of clergy should be granted to all those who were entitled to ask it, without requiring them to read; but that where any person is convicted of any theft or larciny, and burnt in the hand for the same, he shall also, at the discretion of the judge, be committed to the house of correction or public workhouse, to be there kept to hard labour, for any time not less than six months, and not exceeding two years; with a power of inflicting a double confinement in case of the offender's escaping from the



first. And by 4 Geo. I. c. 11. and 6 Geo. I. c. 23. If any persons shall be convicted of any larciny, either grand or petit, or any felonious stealing or taking of money or goods and chattels, either from the person or the house of any other, or in any other manner, and who by the law shall be entitled to the benefit of clergy, and liable only to the penalties of burning in the hand or whipping, the court in their discretion, instead of such burning in the hand or whipping, may direct such offenders to be transported to America for seven years; and if they return or are seen at large in this kingdom within that time, it shall be felony without benefit of clergy. And now, by 16 Geo. III. c. 43. all offenders liable to transportation, may instead thereof, at the discretion of the court, if males, be employed in hard labour for the benefit of the navigation of the river Thames; or, whether males or females, be confined to hard labour in the house of correction, for any term not less than three years, nor more than that for which they are liable to be transported, in any case not exceeding ten years; with a power of subsequent mitigation in case of their good behaviour: but in case of escapes their confinement is doubled for the first offence, and it is felony without benefit of clergy for the second.

We may hence see to what persons the benefit of clergy is at this day allowed. It is allowed to all clergymen, without either branding, and of course without transportation (which is a punishment substituted instead of branding or burning) who are immediately to be discharged, and this as often as they offend: also all lords of parliament and peers of the realm, having place and voice in parliament (which is held to extend to peeresses) shall be discharged in all clergyable and other felonies specified in the 1 Edw. VI. without either burning in the hand or imprisonment as real clerks convict, but this only for the first offence. And all others, not in orders, male or female, shall for the first offence be discharged of the punishment of clergyable offences, on being burnt in the hand, and suffering a discretionary imprisonment; or, in case of larciny, on being transported for seven years, if the court shall think fit.

This privilege was then allowed only in petit treason and capital felonies, and now it is not allowable in felonies, where it is taken away by express words of an act of parliament: but where it is taken away from the principal, it does not follow that it is so from the accessory, unless he be particularly excluded by the words of the act. When it



is taken away from the *offence* (as in case of murder, sodomy, robbery, rape, and burglary) a principal in the second degree, being present, aiding and abetting the crime, is as well excluded from his clergy, as he that is principal in the first degree: but where it is only taken away from the *person committing* the offence (as in the case of stabbing or committing larciny in a dwelling-house, or privately from the person) his aiders and abettors are not excluded: the tenderness of the law construing such statutes literally. By the Marine Law, 28 Hen. VIII. c. 15. however, the benefit of clergy is not allowable in any case whatever, and therefore where offences are committed within the admiralty-jurisdiction, which would be clergyable, if committed on land, the constant rule is to acquit and discharge the prisoner.

Besides the corporal punishment inflicted on such as are allowed the benefit of clergy, the offender forfeits all his goods to the King. After conviction, till he receives the judgment of the law, by burning, or the like, or is pardoned by the King, he is considered as a felon, and is subject to all the disabilities and other incidents of a felon. After burning or pardon, he is, by 8 Eliz. c. 4. and 18 Eliz. c. 7. discharged for ever of that and all other felonies before committed of a clergyable nature, but not of felonies from which such privilege is excluded. By burning or pardon he is restored to all capacities and credits and the possession of his lands, as if he had never been convicted. And as to peers and clergymen they have these privileges and advantages, without any burning, which others are entitled to after it.

IX. We come next to judgment and its consequences. When the jury have delivered in their verdict guilty, in capital offences, the prisoner is asked what he has to offer in arrest of judgment. If the defendant be found guilty of a misdemeanor (the trial for which, if he has once appeared, may be carried on in his absence) a warrant is issued to bring him into court to receive judgment, and if he absconds, he may be outlawed; but whenever he appears in person, he may either on a capital or inferior conviction, now, as well as at his arraignment, offer any exceptions to the indictment in arrest or stay of judgment; as for want of sufficient certainty in setting forth either the person, the time, the place, or the offence; and if the objections be valid, the whole proceedings shall be set aside; but the offender may be indicted again. And indeed so nice and tender is the law in favour of the prisoner, that more knaves escape by exceptions in indictments than by their innocence.

The



The King's pardon, as was mentioned before, may here be pleaded in arrest of judgment, and with the same advantages as upon arraignment, *viz.* saving the corruption of blood, which, if not pleaded till after the sentence, nothing but an act of parliament can restore.

If nothing be offered in arrest or stay of judgment, sentence is now to be passed; which is different according to different crimes, as hath been fully shewn in treating of the several crimes. When sentence of death is past, its immediate consequence is attainder, so called from *attinctus*, stained or blackened, the effect of which is forfeiture and corruption of blood.

1. There is forfeiture of real estates, and forfeiture of personals. By attainder in high treason, a man forfeits to the King all his real and personal property, whether in possession or claim, and this forfeiture takes place at the time the treason was committed, so as to render void all intermediate sales and incumbrances, but not those before the fact, of course a wife's jointure is not thus forfeited, but her dower expressly is, by 5 & 6 Edw. VI. c. 11. and yet the husband shall be tenant by the curtesy of the wife's lands, if the wife be attainted of treason, that being prohibited by the statute. If a traitor dies before judgment pronounced, or is killed in open rebellion, or is hanged by martial law, no forfeiture takes place; for as he never received sentence, he was never attainted. But should the chief justice of the King's Bench, in person, as supreme coroner, upon the view of the body killed in open rebellion, record it, and return the record into his own court, both lands and goods shall be forfeited.

In certain treasons relating to the coin, it is provided by some of the modern statutes which create the offence, that it shall work no forfeiture of lands, save only for the life of the offender, and by all, that it shall not deprive the wife of her dower.

In petit treason and felony, the offender also forfeits to the crown all his chattel interests absolutely, and the profits of all freehold estates, during life, and after his death, all his lands and tenements in fee simple (but not those in tail) for a year and a day, in which time the King may commit what waste he pleases. This year, day, and liberty of waste are now usually compounded for. After this year and a day, in gavel-kind tenure, it descends to the heir, but in other tenures it escheats to the Lord. These forfeitures for felony arise also only on attainder, and therefore *felo de se*, who is never attainted, forfeits no  
lands



lands of inheritance or freehold. They likewise here as well as in treason take place at the time when the offence was committed; so as to render void all intermediate incumbrances and conveyances, a hardship on such as have incautiously treated with the offender, but which hardship they must lay to the part of the criminal, and not of the law.

In misprision of treason and striking in Westminster Hall, or drawing a weapon on a judge there sitting on the bench in office, the profits of the offender's lands are forfeited during his life. Even for flight, on an accusation of treason, felony, or petit larciny, if the jury find the flight, whether the party be found guilty or acquitted, he forfeits his goods and chattels: but this flight the jury seldom find, it being thought too great a penalty for the offence.

Between the forfeiture of lands, and goods and chattels, there is this difference: lands are not forfeited before attainder, whereas goods and chattels are forfeited by conviction; for in many cases where goods are forfeited, there is no attainder. In outlawries for treason or felony, lands are forfeited only by the judgment, whereas goods and chattels are forfeited on the proclamation for outlawry. The forfeiture of lands takes place back at the time the fact was committed; whereas that of goods and chattels takes place only at the time of conviction; a traitor therefore may *bona fide* sell any of his chattels real or personal for the support of himself and family, any time before his conviction; but if they be collusively parted with, merely to defraud the King, the law, by 13 Eliz. c. 5. will recover them; for as the offender, if acquitted, might recover them himself, so may the King, if the offender is convicted.

Between the commission of the crime and the conviction of the criminal, the sheriff or other officer may seize the offender's goods upon indictment, so far as to inventory and appraise them, but shall leave them in the offender's custody, that the party accused and his family may have sufficient out of them for their livelihood and maintenance. 1 H. H. 363, 4, 5, 6, 7. For by 1 R. III. c. 3. no sheriff or other person shall take or seize the goods of any person arrested or imprisoned for suspicion of felony, before he be convicted or attainted, or before the goods be otherwise forfeited, on pain of double value to the party grieved.

2. Another consequence of attainder is corruption of blood, both in ascent and descent; what this corruption of blood is, and how it operates,



operates, is fully shewn in page 134. f. 7. which see. But it must be observed, that in tenures indisputably Saxon or gavelkind, which have been before explained, though land is forfeited to the King, yet no corruption of blood, no impediment of descent ensues; and on judgment of mere felony no escheat accrues to the lord. In certain treasons respecting the papal supremacy, and the coin, and in many of the new-created felonies, the particular acts respecting them enact that corruption of blood shall be saved: and by 7 Ann. c. 21. and 17 Geo. II. c. 39. after the death of the sons of the late pretender, no attainder for treason will extend to the disinheriting any heir, nor to the prejudice of any person, other than the offender himself.

X. Let us next see how judgment, with its consequences, *viz.* attainder, forfeiture, and corruption of blood may be set aside. Now this may be brought about two ways: 1. By reversing the judgment; and, 2. By reprieve or pardon.

By reversing the judgment. This may be done by a writ of error, which lies from all inferior criminal courts, to the court of King's Bench; and may be brought for palpable errors in the judgment or other parts of the record, such as where a man is found guilty of perjury, and receives the sentence of felony; but less errors are sufficient to reverse a judgment, such as any irregularity, omission, or want of form in the process of outlawry or proclamations. Writs of errors to reverse judgments, in cases of misdemeanors, are not allowed but on sufficient probable cause shewn to the attorney-general; nor to reverse attainder in capital cases, without express warrant under the King's sign manual, or at least the consent of the attorney-general. The attainted person therefore can rarely bring this about; but when brought, it is generally by the heir or executor after the criminal's death, by way of consolation to his family: but the more effectual method of a reversing a judgment is by act of parliament, where it can be procured.

Judgment however may be reversed or falsified, without a writ of error or an act of parliament, for matters foreign to, or not apparent upon the face of, the record, as, in both civil or criminal cases, where the whole record be not certified, or not truly certified by the inferior court. If a judgment be given, that is, sentence passed by a person not properly commissioned, it may be falsified or made void by shewing the special matter, without writ of error. As I observed once  
before



before, if a commission issues to twelve persons to try indictments, of which *A* or *B* shall be one, and any other of the twelve proceed to trial without *A* or *B*, all the proceedings in such trial, &c. would be void; and should a man by such trial be condemned and executed, it would be little short of murder in the judge that tried and sentenced him.

Reversing an outlawry puts the party exactly in the same situation, as he would have been in, had he appeared upon the warrant issued to bring him into court; for all other proceedings, except the process of outlawry for his non-appearance, remain good and effectual as before. But when judgment is reversed, all former proceedings are set aside, and the party stands as if he had never been accused; and though upon his attainder the crown may have granted away his estates, yet the owner may enter upon the grantee or possessor with as little ceremony as he might enter upon a disseisor, or one who put him out of possession, but he still remains liable to another prosecution for the same crime; for the past prosecution being erroneous, he never was in jeopardy thereby.

XI. Reprieve or pardon are the other modes of avoiding execution.

1. Reprieve from *repandre*, to take back, is the withdrawing of a sentence for a certain space of time, a suspension only of execution. It is in the breast of a judge to reprieve a convict either before or after sentence; provided he is either not satisfied with the verdict, thinks the evidence insufficient, or is doubtful whether the offence be felony without benefit of clergy; or to give time to apply to the King for pardon where favourable circumstances appear on behalf of the criminal. Judges usually reprieve in these cases, though their session be finished and their commission be expired.

Women capitally convicted, if they appear to be quick with child, are generally reprieved for the sake of the infant, till after their delivery: but when they plead themselves pregnant, a jury of twelve discreet women are directed by the judge to examine into the fact; and if they bring in their verdict quick with child, that is, report that the child is alive within her, execution is delayed from session to session till she is delivered, or proves by the course of nature not to have been with child at all.

If the offender after sentence becomes insane, it is a regular cause of reprieve, as the law knows not, but, if in his reason, he might



have offered some reasons to stay execution. It is an invariable rule therefore, if any length of time intervenes between the judgment and the award of execution, to ask the prisoner what he hath to alledge why execution should not be awarded against him, and if he appears to be insane the judge may and ought to reprieve him. Should the party plead in bar of execution, that he is not the same person that was attainted, or against whom sentence was passed: a jury is immediately impanelled to examine into the identity of his person, and no time is allowed the prisoner to make his defence or produce witnesses, that he is not the person attainted; and in this jury no peremptory challenges are allowed him.

2. But the last and surest resort is the King's pardon. Now the King has power to pardon all offences merely against the crown or the public, except a *præmunire* incurred by committing any man to prison out of the realm. In appeals which are at the suit of the party injured, the King cannot indeed pardon, but the prosecutor may release. Neither can he pardon a nuisance, while it continues, though he may afterwards remit the fine; nor an offence against a penal statute after information lodged; for the informer thereby hath acquired a property in his part of the penalty. And by 12 & 13 W. III. c. 2. it is declared, that no pardon under the great seal of England shall be *pleadable* to an impeachment by the Commons in parliament; as such pardons would defeat the effect of impeachments, but after the impeachment has been heard and determined, the King is at liberty to pardon the offender.

Pardons must be issued under the great seal. Any suppression of truth or suggestion of falsehood in a charter of pardon will destroy it: for the King is supposed in such case to be misinformed. No general words in a pardon are sufficient; for instance, a pardon of all felonies will not pardon an attainder of felony, the attainder must be particularly mentioned; neither will a pardon of felonies include piracy; for piracy is no felony punishable at Common Law. By 13 Ric. II. ft. 2. c. 1. no pardon for treason, murder, or rape shall be allowed, unless the offence be particularly specified therein, and particularly in murder, it shall be expressed, whether it was committed by lying in wait, assault, or malice prepense; designed to restrain the King's pardoning murder so atrociously committed. It is a general rule however, that pardons shall be construed most beneficially for the subject, and most strongly against the King.

Pardons



Pardons may also be conditional; for example, on being confined to hard labour for a certain time, or on being transported for life or a term of years. Pardons by act of parliament are more beneficial than those under the great seal, as a man is not bound to plead such a pardon, the court must take notice of it *ex officio*; nor can a man lose the benefit of such a pardon by negligence as he may of the King's pardon; for he must plead the King's at a proper time, or it loses its effect. By 5 & 6 W. & M. c. 13. the judges have a discretionary power to bind a criminal pleading the King's pardon, to his good behaviour, with two sureties, for any term not exceeding seven years.

Though the King's pardon granted after attainder, will not restore or purify blood corrupted by such attainder, yet it acquits the criminal of all corporal penalties and forfeitures annexed to the crime for which he obtains the pardon, and gives him a new credit and capacity: it enables him to transmit new inheritable blood; and should he after the pardon have a son, that son may be heir to his father, which he could not have been, had he been born before the pardon.

XII. Execution is the completion of human punishments, and in all cases must be performed by the sheriff or his deputy, who acts by the authority of the judge signing the calendar or list of all the prisoners names, with the respective judgments in the margin; for example, in capital felonies, it is written opposite the felon's name, "Let him be hanged by the neck;" which is the only warrant the sheriff has. But for the execution of a peer tried by the court of parliament, a writ or warrant is issued by the King; if tried in the court of the Lord High Steward, the warrant is issued by the judge of that court.

Upon the receipt of the warrant the sheriff is to execute the criminal, within a convenient time, which in the country is left at large, but in London there is more solemnity, both in the warrant of execution and the time of performing it; for the recorder, after reporting to the King in person the case of the several prisoners, and receiving his royal pleasure, that the law must take its course, issues his warrant to the sheriff, appointing the day of execution, and the place assigned; and if the prisoner be tried at the bar of the court of King's Bench, or brought there by *Habeas corpus*, a rule is made for his execution, specifying the time and place, or leaving it to the sheriff; and throughout the kingdom, by 25 Geo. II. c. 37. it is enacted, that in the case



of murder, the judge shall in his sentence direct the execution to be performed, on the next day but one after sentence, except that day be Sunday, and then on the Monday following.

I have had occasion to observe before, that it would be felony in a sheriff to alter the manner of execution, by substituting one kind of death for another. The King cannot even change the punishment of the law, by substituting beheading for hanging or burning: but if beheading be part of the sentence as it is in high treason, he may remit all the rest. And it is clear, that if upon judgment to be hanged by the neck till he is dead, the criminal be not thoroughly put to death, but revives, the sheriff is bound to hang him again; for if a false tenderness were to be indulged in such cases, there might be no end to the collusion.

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I N D E X.

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F I N I S.



The Reader is requested to correct the following errors, one or two of which Time has occasioned.

- Page 2, line 22, *for letter or, read letter and.*  
 6, — 34, *for also declaratory, read also either declaratory.*  
 25, — 7, *for appointing, read appointed.*  
 26, — 12, *for jealous is, read jealous are.*  
 43, last line, *for bounds, read pounds.*  
 54, line 5, *dele in livery and two guineas on servants out of livery.*  
 — 28, *for 200, read 212.*  
 111, — 4, *for or effects of all reversions, read or real effects and of all reversionary estates.*  
 114, — 27, *for beside, an, read besides an.*  
 239, — 19, *for where is, read where there is.*  
 242, last line but one, *for exacts, read enacts.*  
 323, line 26, *for 218, read 215.*



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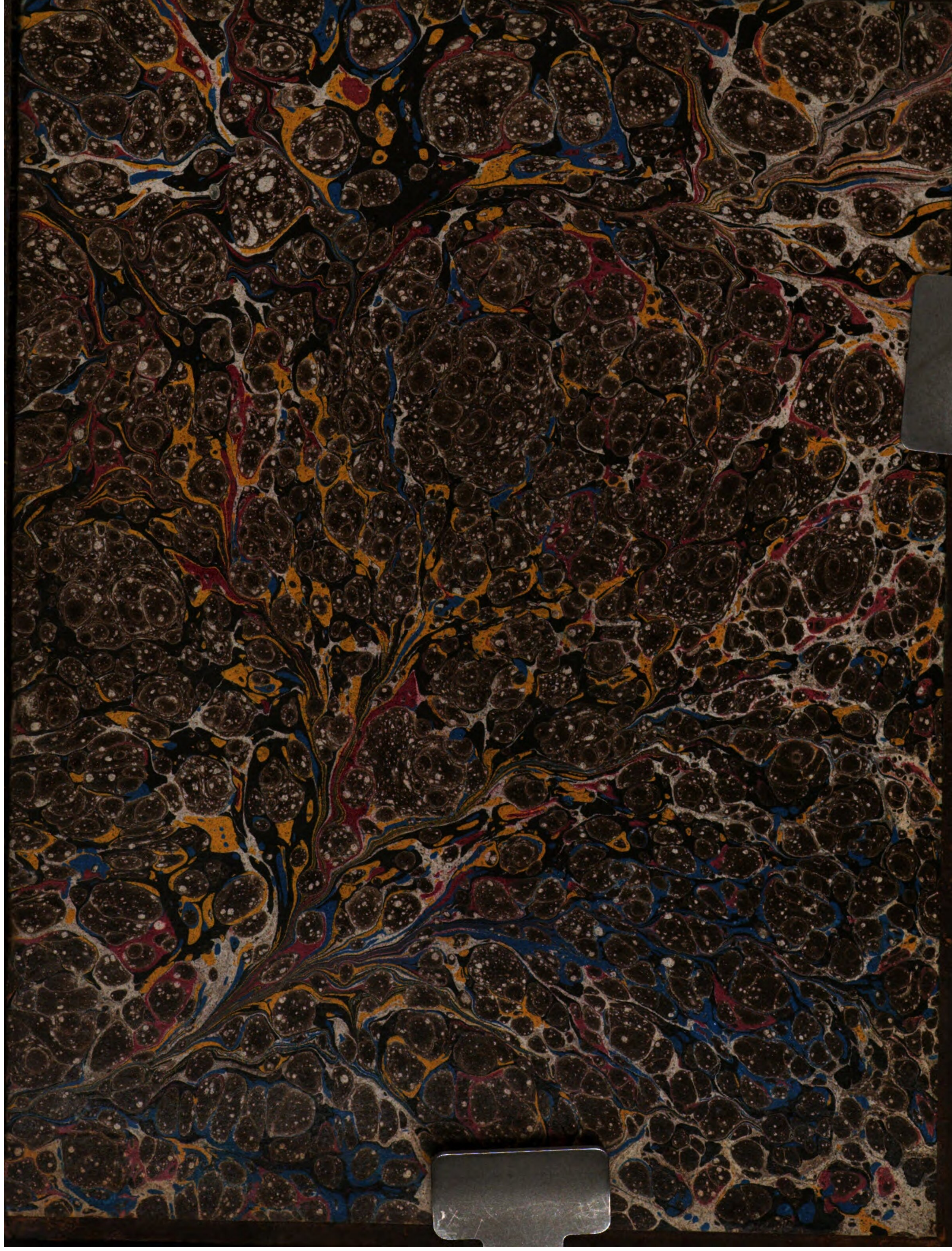


















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